

APPENDIX.

Volume I (pages 1 to 240)

RECEIVED

AUG 25 1972

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

October Term, 1972

No. 71-1422

MURRAY KAPLAN,

Petitioner,

vs.

CALIFORNIA.

On Writ of Certiorari to the Appellate Department of the
Superior Court of the State of California, County of Los
Angeles.

Petition for Certiorari Filed May 1, 1972.

Certiorari Granted June 26, 1972.

IN THE
Supreme Court of the United States

October Term, 1972
No. 71-1422

MURRAY KAPLAN,

Petitioner,

vs.

CALIFORNIA.

**On Writ of Certiorari to the Appellate Department of the
Superior Court of the State of California, County of Los
Angeles.**

APPENDIX.

Volume I (pages 1 to 240)

INDEX

	Page
Docket EntriesApp. p.	1
Misdemeanor Complaint	7
Reporter's Partial Transcript on Appeal	9
Jury Instructions	456
Verdict—Criminal. Dated February 2, 1971	479
Verdict—Criminal. Dated February 3, 1971	480
Verdict—Criminal. Dated February 4, 1971	480
Respondent's Brief on Rehearing	481

APPENDIX.

Docket Entries.

People v. Murray Kaplan

Los Angeles Municipal Court No. 337520

Declaration in support of arrest warrant made under §2015.5 C.C.P. [Code of Civil Procedure] filed, good cause shown pursuant to Section [unintelligible].

Warrant issued, bail set for \$500 plus penalty assessment of \$125.

Date Posted June 5, 1969.

Appearance date June 9, 1969. Amount \$625. Receipt or Bond No. 10206. Surety NAT.

Bond on appeal: Date posted 3/26/71. Appearance date—as directed. Amount \$4375. Receipt or Bond No. 10656. Surety NAT.

PCIC [private counsel in Court] 6/23/69, 1:30—continued for plea to [unintelligible] 1969 at 1:30 p.m.—plea.

B.F. [bail forfeiture] Bench W. [warrant] \$2500 bail \$625 p.a. [penalty assessment]. Bail forfeiture card issued.

6/24/69 Bail forfeiture card BFSA [bail forfeiture set aside]. Warrant quashed. Pleads not guilty. Jury trial in Div. 20 on 7-15-69, 9:00 a.m. Defendant instructed to appear personally for trial. BTS [bail up to stand].

No. 337520

People vs. Murray Kaplan

ADDITIONAL MUNICIPAL COURT
PROCEEDINGS.

DATE

ATTORNEY

July 15, 1969

Board reinstated. Defendant's case continued for trial to 8-14-69, 8:30 A.M. Time waived. Bail to stand. DJA

Bail forfeiture set aside card issued.

Aug. 14, 1969

Stip. case continued for setting to 10/14/69, 1:30 A.M. Time waived. Bail to stand.

Deft. not in court, by/with Atty. Robt. McDaniel.

Oct. 14, 1969

Stip. case continued for setting to 12-15-69, 1:30 P.M. Time waived. Bail to stand. DJA

Deft. not in court, by/with Atty. Robt. McDaniel.

Dec. 15, 1969

Defendant's continued for trial setting to 1-30-70, 1:30 P.M. Time waived. Bail to stand. Witnesses excused. DJA

Jan. 30, 1970

Stip. case continued for trial to 3-17-70, 8:30 A.M. Time waived. Bail to stand. DJA

Deft. in court, by/with Atty. McDaniel, by Peter May.

March 17, 1970

Stip. continued for new setting to 4-27-70, 1:30 P.M. Time waived. Bail to stand. Witnesses excused. DJA

April 27, 1970

Defendant continued for new setting to 7-27-70,
1:30 P.M. Time waived. Bail to stand. Witnesses
excused. DJA

Deft. not in court, by/with Atty. McDaniel.

July 27, 1970

Pursuant to stipulation, Defendant's not in court,
by/with Atty. McDaniels.

Case continued for trial to Oct. 27, 1970, 8:30
A.M. time waived. Bail to stand. RCMcD

Oct. 27, 1970

Case continued for trial to 12-3-70, 8:30 A.M.
Time Waived. Bail to stand. RCMcD

Deft. not in court, by/with Atty. R. McDaniel in
chambers.

1-11-71. RCMcD

Dec. 3, 1970

Division 20, Wilbur G. Dettmar.

Case continued for trial to 1-11-71, 8:30 A.M.
Time waived. Bail to stand.

Deft. not in court, by/with Atty. Robert McDaniel.
PC 311.2

Jan. 11, 1971

Division 20, Wilbur G. Dettmar.

Deft. in court, by/with Atty R. McDaniel.

21

Jan. 11, 1971

DAVID J. AISENSEN. Trial to 1-12-71 9:15
A.M. All ordered back. DJA. Bail to stand.

Jan. 12, 1971

DAVID J. AISENSEN. Defendant's N.I.C. but
represented by counsel. At 4:35 P.M. court re-

cessed, to 9:15 A.M. 1-14-71. Prospective jurors admonished. All ordered to return w/o further order. BTS R.C. McDaniels.

Jan. 13, 1971

DAVID J. AISENSEN. At 5:20 court recessed to 9:15 A.M. 1-14-71. Prospective jurors admonished. All ordered to return w/o further order. BTS

Jan. 14, 1971

DAVID J. AISENSEN. At 5:35 court recessed to 9:15 A.M. 1-15-71. Prospective jurors admonished. All ordered to return w/o further notice. BTS

Jan. 15, 1971

DAVID J. AISENSEN. At 4:40 P.M. court recessed. Jury admonished. All excused to 9:15 A.M. 1-18-71. All ordered to return without further notice. BTS

Jan. 18, 1971

DAVID J. AISENSEN. Jurors #4 Miss Isell Maymudes and #9 Mrs. Sylvia Green call in ill. Both jurors ordered excused and alternative juror #1 Mrs. Nida Freeman empaneled in place of Miss Maymudes and alternate juror #2 empaneled in place of Mrs. Green. DJA. At 3:35 P.M. court recessed. All ordered to return 9:15 A.M. 1-21-71. Bail up to stand.

Jan. 21, 1971

DAVID J. AISENSEN. Juror #11 ill, Melvin Higa. Court orders case continued to 1-22-71 at 9:15 A.M. All ordered to return. Bail up to stand.

Jan. 22, 1971

DAVID J. AISENSEN. Court recessed at 4:07 P.M. Jury Admonished. All excused till 1:30 P.M. 1-25-71. Bail up to stand.

Jan. 25, 1971

DAVID J. AISENSEN. At 3:30 P.M. jury excused and admonished. Ordered to return 9:15 A.M. 1-26-71. Bail up to stand.

Jan. 26, 1971

DAVID J. AISENSEN. At 4:55 P.M. jury admonished and excused. All ordered to return 9:15 A.M. 1-27-71. Bail up to stand.

Jan. 27, 1971

DAVID J. AISENSEN. At 9:30 A.M. jury admonished and excused. Juror foreman not present due to illness. All ordered to return 9:15 A.M. 1-28-71. Bail up to stand.

Jan. 28, 1971

DAVID J. AISENSEN. At 4:25 P.M. jury admonished and excused. Ordered to return 9:15 A.M. 1-29-71. Bail up to stand.

Jan. 29, 1971

DAVID J. AISENSEN. At 3:55 P.M. jury admonished and excused. Ordered to return 9:15 A.M. 2-1-71. Bail up to stand.

Feb. 1, 1971

DAVID J. AISENSEN. At 3:30 jury admonished and excused. To return 9:15 A.M. 2-2-71. Bail up to stand.

Feb. 2, 1971

DAVID J. AISENSEN. At 4:30 P.M. jury admonished and all excused. To return 9:15 A.M. 2-3-71. Bail up to stand.

Feb. 3, 1971

DAVID J. AISENSEN. At 4:30 P.M. jury admonished and all excused. To return 9:15 P.M. 2-4-71. Bail up to stand.

Feb. 4, 1971

DAVID J. AISENSEN. Ct. I—Not Guilty. Ct. II
—Not Guilty. Ct. III—Guilty. T.W.

Defendant's court for sentence 3-4-71 1:30 P.M.
(Mo for new trial). DJA. Referred to Prob. Dept.
for report. Bail up to stand. DJA

March 26, 1971

Defendant's mo for new trial denied. Bail up to
stand. T.W.

Feb. 29, 1972

DAVID J. AISENSEN. Defendant's cont. for
sent. to 3-29-72 1:30 P.M. Defendant's ordered
back. Peo. objection is voted. (to give Defendant's
time to petition Calif. or U.S. Supreme Court.)
Bail up to stand. DJA

March 29, 1972

DAVID J. AISENSEN. T.W. Defendant's cont. for
sentence to 5-8-72 1:30 P.M. Defendant ordered
back. Bail up to stand. DJA

May 8, 1972

DAVID J. AISENSEN. Defendant's cont. to
5-30-72 1:30 P.M. Defendant's ordered back. Bail
up to stand.

May 30, 1972

DAVID J. AISENSEN. T.W. Defendant's trial to
6-5-72 1:30 P.M. Defendant's ordered back. Bail
up to stand.

June 5, 1972

DAVID J. AISENSEN. Cont. for sent. to 7-5-72
1:30 P.M. Defendant's ordered back. Bail up to
stand. DJA

July 5, 1972

DAVID J. AISENSEN. Stip.—cont. for sentence to 11-30-72 1:30 P.M. DJA. To be advanced should the U.S. Supreme Court determine the matter sooner. Defendant's ordered back. DJA. Bail up to stand.

Misdemeanor Complaint.

In the Municipal Court of Los Angeles Judicial District, County of Los Angeles, State of California.

The People of the State of California, Plaintiff, vs. Murray Kaplan, Defendant(s).

Filed June 3, 1969. George J. Barbour, Clerk-D.A.
Filed June 22, 1971.

Issued by Roger Arnebergh, City Attorney.

By Stuart Goldfarb, Deputy City Attorney.

By V. Willis, Deputy.

Comes now the undersigned and states that he is informed and believes, and upon such information and belief declares: That on or about May 15, 1969, at and in the City of Los Angeles, in the County of Los Angeles, State of California, a misdemeanor, to-wit; violation of Section 311.2 of the Penal Code of the State of California, was committed by Murray Kaplan (whose true name to affiant is unknown), who at the time and place last aforesaid, did willfully and unlawfully and knowingly send and cause to be sent, bring and cause to be brought into this state for sale and distribution, and in this state prepare, publish, print, exhibit, distribute, offer to distribute, and have in his possession with intent to distribute and to exhibit and offer to distribute, obscene matter, to wit: An obscene 8 millimeter film entitled "TAMMY AND DANNY".

COUNT II

For a further, separate and Second cause of action, being a different offense, belonging to the same class of crimes and offenses set forth in Count I hereof, affiant complains and says: That on or about the 14th day of May 1969, at and in Los Angeles City, in the County of Los Angeles, State of California, a misdemeanor, to wit: Violation of Section 311.2 of the Penal Code of the State of California was committed by Murray Kaplan (whose true name to affiant is unknown), who at the time and place last aforesaid, did wilfully and unlawfully and knowingly send and cause to be sent, bring and cause to be brought into this state for sale and distribution, and in this state prepare, publish, print, exhibit, distribute, offer to distribute, and have in his possession with intent to wit: An obscene magazine entitled "YUM-YUM".

COUNT III

For a further, separate and Third cause of action, being a different offense, belonging to the same class of crimes and offenses set forth in Counts I & II hereof, affiant complains and says: That on or about the 14th day of May 1969, at and in Los Angeles City, in the County of Los Angeles, State of California, a misdemeanor, to wit: Violation of Section 311.2 of the Penal Code of the State of California was committed by Murray Kaplan (whose true name to affiant is unknown), who at the time and place last aforesaid, did wilfully and unlawfully and knowingly send and cause to be sent, bring and cause to be brought into this state for sale and distribution, and in this state prepare, publish, print, exhibit, distribute, offer to distribute, and have in his possession with intent to distribute and to offer to distribute, obscene matter, to wit: An obscene book entitled "SUITE 69".

Reporter's Partial Transcript on Appeal.

In the Municipal Court of Los Angeles Judicial District County of Los Angeles, State of California. Division No. 21.

Hon. David J. Aisenson, Judge.

The People of the State of California, Plaintiff vs. Murray Kaplan, Defendant. No. 337,520.

CHARGE: THREE COUNTS, VIOLATION OF SECTION 311.2, PENAL CODE.

APPEARANCES:

For the People: Gerarde F. Imhoff, Esq. Deputy City Attorney.

For the Defendant: Stanley Fleishman, Esq. By: Robert McDaniel, Esq. 6922 Hollywood Boulevard, Hollywood, California 90028.

**LOS ANGELES, CALIFORNIA, TUESDAY,
JANUARY 12, 1971 10:50 A.M.**

(The following proceedings were held in chambers:)

THE COURT: The case of People versus Murray Kaplan.

The record will show that the defendant is represented by counsel, Robert McDaniel, Esquire. The People are represented by Gerarde F. Imhoff, Deputy City Attorney.

The proceedings are being conducted in chambers with regard to some pretrial motions that the defense wishes to make.

MR. McDANIEL: Yes, your Honor.

With regard to the first of these motions, I would move at this time that your Honor dismiss this prosecution on the basis that the State law of obscenity as applied here under 311.2 of the Penal Code is no longer a valid law to prosecute under where there is a dissemination of any material, be it classified with the status of obscene or not, where the dissemination is to consenting adults and where there is no claim that there's been an assault upon individual privacy by obtrusive publication and where there's no claim, as there is no claim here, that there is a dissemination to minors; that under the authority of the United States Supreme Court in the case of Stanley versus Georgia, 394 U.S. 557, such a prosecution is not viable because any form of expression does enjoy First Amendment protection unless the specific problems indicated earlier are present, i.e., a dissemination to minors or an intrusion privacy of the public, neither of which is present in this case.

So I would respectfully move that this prosecution be dismissed on that basis at this time. And I will submit that motion now.

THE COURT: Very well.

Do you wish to respond, Mr. Imhoff?

MR. IMHOFF: To the extent that Stanley versus Georgia is limited, in my opinion, to the specific facts of private possession in one's own home. Stanley versus Georgia does not make any other distinction about having to be on an unwilling public or on individuals or privacy or children. As a matter of fact, the Stanley versus Georgia case specifically states that the Roth case is still good law. The states have broad power to regulate dissemination of obscenity.

And another point I'd like to make is that I think

this motion is not well taken because it's more in the nature of a demurrer, and it's far too late at this time to demur to the Complaint on constitutional grounds.

MR. McDANIEL: Let me just respond briefly to those points, your Honor.

First of all, the latter point. I believe it's correct that a demurrer has been previously filed, argued and been overruled in this case sometime back; and I am making this motion now because under the Constitution one has a right and, indeed, one's counsel, a duty to make motions at all phases of the proceedings where constitutional rights are being deprived and particularly where First Amendment rights are being deprived. So that's why the motion is properly in order.

The second point I'd like to make is that Stanley versus Georgia is not as narrow a holding as counsel would claim here. As a matter of fact, the specific language of the holding is that this protection extends not merely to the possession of any material but also to the right to receive any form of communication. And the great majority of Federal courts which have dealt with this particular problem have indeed ruled that, because of Stanley versus Georgia, prosecutions where consenting adults receive any form of material, including obscenity, do not state a cause of action. And the recent case of Norman Reidell here in the Central District illustrated that point. The 37 Photographs case also was a three-judge court which made that rule. There has been a variety of other cases, including Karalexix, which have held to the same effect.

The same proposition of law has indeed been accepted in the State-level courts in this State also. Arguments in motions to this effect have already been sustained in courts sitting in Oceanside in San Diego

County, in two different courts in the Central District of Orange County, in Santa Ana, in cases involving approximately 14 separate cases, a case in Los Angeles County in the Newhall District. All of the pending obscenity cases in Alameda County have been dismissed because of this basis also.

So we're not talking about a counsel's extrapolation from a case. We're talking about what I consider to be good law at the present time. And so I think that the motion is properly in order, and I, without arguing further, will submit it at this point.

MR. IMHOFF: I have just a few brief comments. There may be a few Federal courts, District courts that have bought this interpretation of Stanley versus Georgia, and a few isolated incidents of lower Municipal courts somewhere around the State. However, those are not binding on this Court. I think it is just as logical to argue that what the Supreme Court was doing in Stanley was saying, We don't want to prosecute the individual in the privacy of his own home on this; the people we want to go after are the disseminators and the people who exhibit and sell them. It's just as logical an interpretation of the extension of Stanley versus Georgia that counsel is making here.

I think that, of course, Karalexis and some other cases have been argued before the Supreme Court now, and sometime shortly there should be a decision on whether or not Stanley versus Georgia means what defense counsel says it means. However, it's our position that it does not. I think if the Supreme Court intended that, they would have said it. I think they were very specific in limiting it.

I'll submit it on that basis.

MR. McDANIEL: Just one other point. It's not

just Stanley versus Georgia but a case that we discussed with your Honor yesterday, the 1967 case of Redrup, the Supreme Court case we discussed in chambers yesterday off the record. And that case was approximately 18 months preceding Stanley.

In that case there was a reversal after listing that there was no claim of intrusion to the general public and dissemination to minors. After that they just simply stated, We find the material not obscene in the constitutional sense. And then the development of Stanley, I think, showed that the Court's thinking is now that any communication is protected unless it's disseminated in the wrong fashion; and the wrong fashion means strictly dissemination to minors or to obtrusive public display only.

The same point, by the way, your Honor, is before the State Supreme Court for decision in the case of People versus Luros, docket No. 1347 at the State Supreme Court. Final argument was had on that case October 8, 1970, and a decision should be forthcoming from that body shortly. The U.S. Supreme Court has already heard argument on two cases involving this issue, has two more coming up on January 20th. And either the State Supreme Court or the U.S. Supreme Court will be ruling with some degree of finality on this issue within the next six months, maximum time, I would suggest.

So, again, based on that, I would submit it to your Honor at this time.

THE COURT: Very well. It's the Court's opinion that the thrust of the defense motion goes to ultimate facts that may be developed at trial which the Court is not prepared to rule on at the present time. Under good pleading practices, it's not necessary that facts

be pled. From the language "for sale and distribution, publish, print, exhibit, distribute, offer to distribute, have in his possession with intent to distribute and to exhibit and offer to distribute obscene matter"—the language would certainly permit the People to—that is, the framework of the presentation would permit the People to prove that such material was being offered to adults, that it might constitute an assault on privacy, and that the general public would include minors as well.

MR. McDANIEL: Well, your Honor, let me just interrupt because I think that counsel would stipulate at this time that there is no claim and they do not intend to prove dissemination to minors nor do they intend to prove assault on the general public by public display.

Is that so stipulated, Counsel?

MR. IMHOFF: Yes. We're going to prove that—intend to prove that defendant exhibited or sold—distributed, rather, obscene material.

MR. McDANIEL: To an adult.

MR. IMHOFF: To an adult.

MR. McDANIEL: And your stipulation is that there is no attempt or claim to prove that there was a dissemination to minors or a public display to the general public in any fashion?

MR. IMHOFF: There may be an issue on—

THE COURT: Well, certainly, the offer to distribute would certainly—

MR. IMHOFF: I have to check. There may be a fact with regard to an unwilling party, but at this time I don't think so.

THE COURT: In any event, looking to the pleadings, which is what the Court must do at this time—

looking to the pleadings, I don't think that your point is well taken.

As a consequence, defendant's motion to dismiss on the grounds stated is denied.

MR. McDANIEL: Okay. I would ask that your Honor would keep that particular proposition in focus during the trial.

THE COURT: Very well.

MR. McDANIEL: And perhaps subsequent argument after the People's case might be made on this point again if it becomes seemingly relevant.

THE COURT: Well, of course, if there's a motion aimed at the sufficiency of the evidence, that's another matter. Of course, the Court is not going to precommit itself to a finding at this time.

MR. McDANIEL: I understand, your Honor.

MR. IMHOFF: I'd like to point out that the demurrers on these grounds in our courts have been summarily overruled in all cases that I know of.

MR. McDANIEL: Just in the City of L.A., not in the County of L.A.

MR. IMHOFF: That's right.

MR. McDANIEL: Okay.

Then moving onto the next point, at this time I will ask your Honor to specifically consider the item that's listed as Count III in this Complaint, and that's a violation for the sale of an obscene book entitled "Suite 69."

Now, again, I had mentioned to your Honor yesterday and also to Judge Dettmar in some subsequent conversations not about this case alone but about a group of cases with regard to the printed word—and again I would ask for a stipulation from counsel at this time that Count III refers to a publication which is

exclusively printed word and not photographic material.

So stipulated?

MR. IMHOFF: The text of the material, as I recall, is printed word, except in the back of the book there are a few ads, I believe, for other books which have a couple of pictures in them; but other than that, there are no photographs.

MR. McDANIEL: In essence, it's a prosecution on the printed word, I take it.

MR. IMHOFF: Yes.

MR. McDANIEL: And with regard to that, that particular aspect of obscenity law, I think it's fair to say, has been closed out by more recent Supreme Court rulings of particular importance. I would list the Hoyt versus Minnesota case, 90 Supreme Court 2241, and also Bloss against Dykema, which is 90 Supreme Court 1727.

Particularly in the Hoyt case which was on printed word materials where findings of obscenity by other courts were reversed by the Supreme Court, what the result is—and I would specifically refer to a publication entitled Supplement to Selected Obscenity Cases, edited by Stanley Fleishman, published by Blackstone Book Company, a copy of which has been supplied to this Court, which articulates to some degree this recent development. It's basically the October term, 1969, cases which they're referring to. The October term, of course, refers to the entire term running normally through June of the succeeding year.

In these cases, Hoyt and Bloss and the other related cases which are Carlos versus New York and Walker versus Ohio, which were all cases decided in March, April or May of 1970—particularly with regard to

Hoyt—and I have one copy of one of the works that was involved in the Hoyt case which I will present to your Honor for inspection after 12:00 o'clock today. My associate is bringing that down to me and will be down here at 1:15 or 1:30, so that's not with me physically at this time.

Anyway, after that—and I've looked over the Suite 69—there is no constitutional distinction whatever. The Business as Usual is the one that I'm referring to from Hoyt, and it's a book which is just a series of sexual vignettes throughout with all the sexual activities described in great detail, using all the euphemistic Anglo-Saxon terms conceivable, fuck, shit, cock sucker, and so forth, and descriptions of the sexual acts in glaring detail. There isn't any constitutional distinction, and I think that—anyway, in the interest of making this trial a little more reasonable for the Court's problems, I think that your Honor should very probably grant a motion to dismiss that particular section at this time because it really is factually correct as I've asserted, your Honor; and we have two other counts to this Complaint which this particular reasoning would not apply to as succinctly, because I would concede at this point that the law is not quite that clear with regard to motion pictures and pictorial material.

The other two counts—one involves a film and the other a picture magazine, as I understand it. But with regard to Count III, I think my position is extremely well taken there, and I might point out that Judge Dettmar indicated that he probably agreed with that view and indicated that of the stack of cases which we have, the printed word cases should be kept in the back with an eye toward an eventual disposition of those cases, because he felt that this reasoning was probably correct in that regard.

Mr. Imhoff was present during those discussions, as I recall, yesterday afternoon.

Is that correct, Mr. Imhoff?

MR. IMHOFF: Have you finished?

MR. McDANIEL: Yes.

MR. IMHOFF: Yes, I was there.

I would oppose the motion to dismiss Count III on the book. What counsel, I believe, is asking here in effect is a pretrial determination of the obscenity of the book which he is not entitled to in a case of this nature. There's been no seizure of any material.

Under California law if there were a search warrant issued and material seized, they would be entitled to a speedy determination under 1538.5 of the Penal Code. Defense counsel is asking the Court to make an independent determination here of the obscenity of the material which is an ultimate fact the jury has to decide. These cases defense counsel has cited here are percuriam reversals which do not really tell us much about why the cases were reversed as far as the issues are concerned.

Counsel's position, I believe, as I understand it, is that the printed word may not be obscene, and I think that's fallacious. The test of obscenity can apply and should apply to the printed word just as much as to photographs or any other material. It's to be determined on the basis of whether it appeals to prurient interest and affronts contemporary standards and has no redeeming social importance. And I don't think there's any case authority or any authorities counsel has cited for such a proposition.

I would oppose the motion on the first instance as I pointed out before, in that defense counsel is not entitled to a pretrial determination of obscenity. The

judge would have to read the book to make his determination. It's like having two trials, and it wastes a lot of time.

And if it were a case of a seizure of material, I would agree that we—under the 1538.5, they'd be entitled to, within 24 hours, a determination of obscenity.

But this was a buy situation in which the material was bought in a bookstore. There's no chilling effect on First Amendment rights to warrant such determination.

MR. McDANIEL: Judge, before you rule on this motion, I've got a few other words to bring out.

Judge, in responding to Mr. Imhoff's statements, first of all, I was leading up to and hadn't even gotten to a request for your Honor to hold a pretrial determination of obscenity which was called a Noroff motion in the past. And counsel's arguments were directed toward that particular issue of asking for a pretrial determination of obscenity by the judge before it goes into a jury trial or a trier of fact situation.

I don't want to respond to those comments until I get to that motion. I have case law on that point.

What I was asking for specifically here with this motion with regard to Count III was something a little bit different than that which was just based on constitutional law.

THE COURT: As the Court understands the thrust of your argument, it appears that you contend that obscenity prosecutions as to printed word are unconstitutional, basically.

MR. McDANIEL: Because of factual determinations that such materials are just not obscene. If they were at any time, they are not now. And in the interest of saving the Court's time, I think the motion

is valid. I don't want to argue it to any further extent than that, so I'll just submit that particular motion at this time.

THE COURT: Very well. I want to get 90 Supreme Court and look over those cases. The book is on its way up.

MR. McDANIEL: Okay. In the meantime, since we will be getting into a request for a pretrial determination of constitutional fact—that is what it's properly known as—I would like to point out to your Honor that there is recent support for the concept of a pre-trial determination of First Amendment issues which came out in the case of *In re Cox*, 3 Cal. 3d, 205, and—let's see. The date of that was October 1, 1970, by the State Supreme Court here. I might point out that this case was not an obscenity case, but a First Amendment issue arose in the case. And the Court discusses the propriety of making a pretrial motion where First Amendment rights are involved. And so, for instance, here on Page 224 of that opinion, they state, "Although, without proof of petitioner's particular conduct, we have been in a position to resolve the legal questions of whether the challenged ordinance is constitutionally void for vagueness or pre-empted by State law, we cannot fix petitioner's First Amendment rights in that void."

Going then to a footnote, Footnote 23, Footnote 23 points out:

"We do, of course, realize the chilling effect that prosecution might exert in deterring petitioner and other individuals from exercising their fundamental rights."

If I can continue, I'm quoting from Footnote 23 of *Cox* at this point.

As I said, "We do, of course, realize the chilling effect that prosecution might exert in deterring petitioner and other individuals from exercising their fundamental rights," citing *Dombrowski* against *Pfister*, a Supreme Court case.

Quoting again, "But, without the facts, an Appellate Court cannot successfully ascertain on pretrial habeas corpus whether petitioner's conduct deserves protection from criminal prosecution," again citing cases.

Continuing the quote, "The Municipal Court before which petitioner may come to trial stands in a far better position than this Court to alleviate this chilling effect in the first instance. If the defendant requests, the trial court may, of course, initially determine as a matter of law the ultimate question of First Amendment protection upon a hearing before the trial of the case," citing *People versus Noroff* and *Zeitlin versus Arnebergh*.

And so I think with that type of supporting language by the State Supreme Court—and I might point out that this was an opinion which was a unanimous opinion by the State Supreme Court. There were no dissents on this opinion. I think that puts this concept of a pre-trial determination on a more sound footing than it was before.

And the brief history of this brief trial hearing in an obscenity case, particularly with relevance to Los Angeles County, is that up until the last year, from 1966 on—up until the last year, we always were allowed to entertain pretrial determinations in these courts on obscenity matters. It's just been in the last year that there's been a kick-back to that; and one practical effect of that kick-back is essentially this stack of cases that we're faced with now, because a

great number of these cases, in my judgment—not all of them, of course, but a great number of them would have been resolved by a pretrial determination which the People have an absolute right to take up to test its validity. That's what happened in the People versus Noroff case.

I don't think there's any support for the theory that such a determination may not be granted by the Court. The argument, as I understand it, is on whether the Court is compelled to hold it, and I think that this case puts the Court's decision more in a position perhaps not of being compelled but of showing the efficacy of holding that hearing.

I don't know if I could say that this case holds that you must have a hearing, because that wasn't the specific point decided on by the case; but I think this language of support for that proposition makes much more persuasive the view that such a hearing is proper and valid.

Just to give you the practical reasons—I gave you one already. It gets rid of a lot of cases that shouldn't go any farther. Now, if you were to grant one in this particular case, you might determine that it should go on to trial. I don't know. That's up to your Honor's decision.

Or you might determine that, indeed, under the state of the law today with the decided cases—and I have materials that I can present to your Honor right now from decided cases on an appellate level and a trial court level and the Supreme Court level. I have the materials which were prosecuted and were found not obscene right here with me in my briefcase. It's very possible that we might be able to avoid a lengthy trial in this case.

That doesn't mean that I won't wind up going to trial today in your division or Mr. Imhoff, because I'm sure that if that happens another case will come down here right away. But I think that there is a great deal of rationality to support the view that such a hearing should be held.

I'd like to show your Honor this part of the thing. It's basically this footnote 23 that I was reading from.

THE COURT: Well, basically, what it appears to the Court is that you're obliquely questioning the jurisdiction of this Court to proceed with a prosecution for subject matter which is constitutionally protected. The jurisdiction, of course, can be questioned at any stage of the proceedings.

MR. McDANIEL: Well, what I'm asking your Honor to do is not precisely that because I'm not particularly questioning the Court's—maybe I am. Maybe legally speaking that's correct. But all I'm asking your Honor to do is to take this pretrial inspection of the materials and determine whether they should go on to trial or whether, as a matter of constitutional fact, they're protected and it should stop here. And I would not presume to go through the same type of evidence taking which we would in a trial. I would make it on a very limited basis; if that was not sufficient, go right into picking the jury and going ahead with the trial. But what I'd like to do is submit it to your Honor on an inspection of the charged materials in comparison with the materials that have already received protection from high courts.

MR. IMHOFF: May I respond?

THE COURT: Certainly.

MR. IMHOFF: First of all, *In re Cox*—the cases that are cited in the footnote *In re Cox*, *People versus*

Noroff—for one thing, it was a stipulated motion between the two parties. And Zeitlin versus Arnebergh, I believe, was an injunctive procedure against prosecution and threatened prosecutions of cases where the police or the City Attorney or somebody said, We're going to prosecute that book if you sell it.

So there was a complete interference with the exercise of First Amendment rights from that standpoint. In *re Cox* is a case that involves—does not involve an obscenity case. In *re Cox* the defendant's First Amendment rights were infringed upon at the very outset. He was not permitted to exercise his First Amendment rights. He wanted to go into a supermarket, I believe, and he was run off the property, as I recall the facts of the case.

So in the first instance his constitutional rights were violated. He wasn't even allowed to exercise them at all, period.

Now, the purpose of any pretrial determination of obscenity, as I understand it, is to prevent a chilling effect on First Amendment rights. Now, this can only arise if, for example, there is a search warrant and they go out and seize a film or seize something in a movie theatre, seize some material. In that case, then, the defendant does not have the material. He cannot exercise his First Amendment rights. The public has no access to the information or whatever he wants to disseminate or exhibit, and there may be a chilling effect on First Amendment rights in that case.

And the whole purpose of a pretrial determination of obscenity would be to prevent that material from being tied up for six months or a year. However, we don't have a situation like that here. We have a book

buy situation. There's no search warrant. There's no seizure of any material.

Pretrial determination of obscenity—there really is no authority for that in California, regardless of the two cases that they cite at the bottom. They say they may in that particular case, in the Cox case—they may determine the First Amendment rights at hearing, but that's a completely different ball game than an obscenity case where, in the first instance, he is prevented from exercising any right at all of free expression, of being kept out of a public place.

And so it's our position that there's no authority for this, that it entails two trials, and the test is not a comparative one, comparing it to other materials. The test is in regard to the tests laid down in the statutes under Section 311. 300 was to whether something's obscene or not. You have to judge it on the basis of the material itself. It has to rise or fall on its own merits.

On a pretrial determination of obscenity, the Court would, no doubt, have to rule. In my opinion in this case they can't rule as a matter of law that the material is not obscene. You'd have to proceed to a trial on the merits.

The Court at any time during a trial can terminate those proceedings if the Court feels that the People have not sustained their burden, have not sustained that the material is obscene as a matter of law. You can take it away from the jury. You can grant a 1118 P.C. motion. And it's a total waste of time to have a pretrial determination of obscenity that could last two, three, four days.

MR. McDANIEL: Well, just responding to counsel's arguments in order:

First of all, there is authority for such a motion. The Noroff case is the basic authority for the motion. Cox, I think, is even more supportive of the motion and a much more recent case. The question, as I said, was, is it mandatory or is it discretionary? I think that where it is a First Amendment right it is mandatory. It's perhaps true that Cox does not make it mandatory by its precise language, but it does strongly underscore the advisability of such a motion.

In terms of the time involved, I don't see that as being a rational problem at all because I think that a visual inspection of the magazine charged, the magazines that I have with me, is only going to take 20 minutes at the most; and I think that it may end this litigation at a more reasonable point.

Again, it's possible that your Honor would rule it goes on to trial. That I don't know.

MR. IMHOFF: You can't determine by comparing because if somebody was found not guilty in one case you can't assume that necessarily the material was not obscene. There may be other reasons why a person was found not guilty.

MR. McDANIEL: With regard to that, I can supply that missing link to the Court because the materials that I have were materials which were found not obscene with specific findings of nonobscenity, so they were not cases where guilt was an issue particularly.

MR. IMHOFF: People versus Noroff was, as I say, stipulated by both parties that there would be a pretrial determination of it. It certainly was not mandatory, and there is no mandatory law that the Court has to have a pretrial determination of obscenity. It's a total waste of time in a case like this.

THE COURT: Well, permit me to go over the

authorities, and I'll rule on the motion as soon as I've read the authorities.

MR. McDANIEL: Fine, your Honor. I'll leave your Honor to read the cases at this time.

THE COURT: I might comment with regard to other points.

The Court will not be particularly impressed by comparisons of rulings and other courts of equal jurisdiction; but if you can show me material determined by a review court which would be binding on this jurisdiction—

MR. McDANIEL: I do have those materials, and I'd like to also ask your Honor to consider in that regard—and it's mentioned in this supplement which your Honor has—the decision in the Pinkas case where a finding of nonobscenity was affirmed by the United States Supreme Court just recently. That just happened about one month ago, perhaps six weeks ago. And I'll find the portion in here where that's discussed.

This is to be found on page 61 of the Supplement, your Honor, and the case is Pinkas versus Pitchess. It was a description of the motion picture film involved, and this is the text of the ruling by the United States Court of Appeals for the Ninth Circuit where they held the material was not obscene. The only additional fact that's not in here is that subsequently it did get up to the U.S. Supreme Court, and there the U.S. Supreme Court affirmed that finding.

So, again, I'll leave that for your Honor.

THE COURT: Yes, I have it.

MR. McDANIEL: Okay. And I'll leave your Honor to look over those cases at this time.

MR. IMHOFF: Again, I'd just like to say, all they did in Pincus was decide that a particular film

was not obscene. And every particular film or book has to rise or fall on its own merits, according to the test of obscenity which is laid down in the Code.

MR. McDANIEL: But comparable materials ruled on by higher courts are, of course, binding on this Court and, I think, must be considered in that regard.

MR. IMHOFF: Not necessarily. You can't say that—

THE COURT: Well, of course, the question of comparability is also a question of fact.

MR. McDANIEL: But I think, in the general sense, where you have material that was the subject of a prosecution for obscenity—it deals with nude people doing a variety of sexual activities. The comparability is met by material like that. And so I think it's safe to say that these are comparable in the sense of how we have to determine. There have been many holdings where there was a refusal to allow comparable materials, in that the courts have found that a denial of due process.

In re Harris of the State Supreme Court in California so held, 56 Cal. 2d, I believe, 879; and there's been more recent articulation of that by various Federal courts. I'll get into that subsequently.

THE COURT: All right.

(Whereupon, there was held a recess.)

LOS ANGELES, CALIFORNIA, TUESDAY,
JANUARY 12, 1971 2:30 P.M.

(The following proceedings were held in chambers:)

THE COURT: The Court has read and considered the authorities presented, to wit, Hoyt versus Minnesota, Bloss versus Dykema, the Supreme Court opinion

shedding very little light other than to refer to the Roth case which the Court read, and the Noroff case.

In Hoyt versus Minnesota, it appears that the issue presented was the interpretation of an Ohio statute, which statute is not before the Court so I can't make any comparisons with the statute involved herein.

MR. McDANIEL: Could I make one—the Ohio statute is one that has the exact same test set out by Roth. I could ask you to take judicial notice of it. I could prove it by the official record. But their statute does prescribe obscenity in the same fashion that ours does, the same three-part test.

THE COURT: In any event, it refers to Roth with approval, and in Bloss versus Dykema it also refers to Roth and sustains the court below without any indication as to what the court below did or stating any definitive reasoning.

In the Noroff case it appears that the question there was the definition of obscenity, which both sides appear to have agreed on, and where they particularly indicated that this is not a case in which the prosecution charged the offense in the context of the circumstances of production, sale and publicity, but merely took the stand that the publication itself without these other factors was obscene.

MR. McDANIEL: Excuse me again, your Honor, because there's one fact that's very important to the reasoning here, and that is that in this particular case—this case is one that is before your Honor in the same fashion. There can be no evidence of commercial exploitation introduced in this case because the statute which changed that and allowed that type of testimony to come in did not occur until after this case was filed and arrests were made. And this case has to be tried

on the basis of the law as it read then, at which time they were unable to proceed on a pandering basis, which is what that principle was about; and that's the way this case stands, too.

So what I'm asking here is for a determination of obscenity, the material itself, without the context of any type of pandering because that isn't before us in this case.

THE COURT: The allegations indicate published, print, exhibit, distribute, offer to distribute, and have in possession with intent to distribute and to exhibit and offer to distribute.

MR. McDANIEL: I would offer to make an offer of proof to this Court that the statutory language charging the defendant in the Noroff case was identical to what it is here. It's just the language of the statute. It was the same then as it is now.

THE COURT: In the controlling case, in the Roth case, the language in the majority opinion and in the two dissenting opinions indicates that the question of obscenity is a question of fact and that each item must be determined on its own merits. I find no substantiation of the defendant's position, in the reading of any of these cases, that the printed word cannot be the subject matter of an obscenity finding.

I must say that before reading the authority the Court was impressed with the defense argument and leaned toward the defense's position; but I don't see from the readings that the Court has engaged in that this position is substantiated.

MR. McDANIEL: Let me see, your Honor, if my co-counsel can add any further weight to this position.

THE COURT: I'll say this: If you can show me authority to the effect that the printed word has now

been excluded from consideration on the question of obscenity, I would be moved to dismiss Count III.

MR. McDANIEL: Well, the only—I think the only way that I could establish that is by having you look at some or even one of the materials involved in those recent nonobscenity findings because it becomes, I think, a matter of simple fact that you can't go beyond what was done in the materials that were found not obscene, particularly in that Hoyt case, and—so that I think it's kind of on that thread. This is a book, Adam and Eve, found not obscene in that case.

MR. IMHOFF: Your Honor, I'd object to this procedure. There's been no ruling on the motion as to whether we're going to have a pretrial determination of obscenity or not.

MR. McDANIEL: This is to explore the case itself, because I think, without seeing the material, looking at the case, as his Honor said, I think was with merit. It's very difficult to tell anything just by reading the case without seeing what the exhibits were. This is one of the exhibits that was involved in the case, and I think that supplies the thread of rationality which is missing by just looking at the bare bones, words, because it's kind of meaningless to look at systemic argument without looking at what the subject matter was.

MR. IMHOFF: Because one book has been found not to be obscene doesn't mean that another book is not going to be found to be obscene.

THE COURT: The thing that's impressed the Court is the implications in Roth and also in Noroff to the effect that each item should be judged on its own merit, indicating that it is a factual determination.

MR. McDANIEL: It is, but to aid in coming to

that determination it's always been the principle that you look at what's been litigated, at least, plus—

THE COURT: Well, of course, what's been litigated could be considered contemporary standards in assisting the fact finder.

MR. McDANIEL: Exactly.

THE COURT: So, you see, this matter is being submitted to a jury. The Court can assist as the thirteenth juror after the evidence is presented, and I can hear appropriate motions. But you're asking for a pretrial factual determination—

MR. McDANIEL: Such as was done in Noroff.

THE COURT: Yes. As I understand, that was done by way of stipulation, if I'm not mistaken.

MR. IMHOFF: Yes, that's true.

THE COURT: However, the stipulation is opposed. The Court was willing to proceed on the theory that if, as a matter of law, the subject matter was not obscene, then the Court would have no jurisdiction to proceed because this would be mere spoken or written utterance which could come within the protection of speech. The Court would not be empowered to proceed.

But on the basis of having read this—the authority, the motion will be denied.

MR. McDANIEL: So, really, that amounts to a denial of two motions, the Count III motion and the general pretrial motion, as I see it.

Is that correct?

THE COURT: Yes, a pretrial determination of fact, if it's—the matter is submitted to the jury for determination of fact, the Court will not invade the province of the jury, other than by already prescribed methods of appropriate motions should the People not sustain the burden.

MR. McDANIEL: As your Honor indicated, the thirteenth juror being the judge, it is a matter of legal fact, going clear back to Zeitlin which was a '61 case, Zeitlin against Arnebergh, that the Court at each step of the First Amendment proceeding must make its own determination as well as the trier of fact. So I feel that you as the judge have the requirement of making that determination at some point. It may come up at different points. Some people have argued the best time is at this pretrial stage, and others have argued that it should be done at the conclusion of the prosecutions case or at the conclusion of the entire case. But I think that your Honor does have the constitutional requirement to make that determination at some point; and in a sense that's tied in pretty closely to our procedural considerations in normal criminal cases where we do have the 1118.1 motion.

THE COURT: Yes, you have the 1118.1 motion which is statutorily presented to you. I'm not convinced that Noroff provides a pretrial review in all cases. There was a pretrial review there by stipulation, and the Court was presented the limited question of reviewing the determination of the trial court which meant a factual finding which they refused to disturb.

MR. McDANIEL: Well, that's—I've given you the authorities, and there are not other authorities in the state cases so—

THE COURT: It may be you may ultimately be right, but I don't think you have this motion as a matter of right. I don't think it's been established by either statutory law or case law.

MR. McDANIEL: I understand. And so we're prepared to go ahead.

THE COURT: Shall we call for the jury panel?

All right. Let's go back into the courtroom, then.

(Whereupon, there was held a recess.)

(The following proceedings were held in open court:)

THE COURT: All right. You may be heard.

MR. IMHOFF: I would like to inquire as to the whereabouts of the defendant, your Honor. Defendant, as far as I know, is not in court in this matter, People versus Kaplan. The People would like to have the defendant present.

MR. McDANIEL: Your Honor, under the statute, in a misdemeanor case the defendant can appear by counsel, and I will appear for the defendant. The defendant will be here at points during the trial where I deem it pertinent and relevant for him to be here. However, he's a businessman who cannot afford the amount of time of being here the entire time, and so I will represent him throughout. And he will be here at relevant points during the trial.

MR. IMHOFF: Your Honor, the People would prefer to have the defendant in court. There's been no showing even that defendant's aware of the fact that a trial is taking place. I believe the Court has the discretion to require the defendant to be here, to issue a bench warrant for his appearance.

MR. McDANIEL: Well, the defendant is aware of the case.

THE COURT: This is a misdemeanor matter, and he may appear by counsel in a jury trial. I don't think I have the power to order him to be here. He's complied with the requirements in a misdemeanor prosecution.

MR. IMHOFF: I don't believe there's been any showing that defendant has informed the Court that

he's aware of the fact that he's being tried in this misdemeanor case.

THE COURT: Counsel has made representation that he is.

MR. McDANIEL: I'll take the witness stand at this time, your Honor. May I be sworn?

THE COURT: Will you accept Mr. McDaniel's representations?

MR. IMHOFF: I'll accept them.

THE COURT: All right.

The record will show that defendant is not in court but represented by counsel.

(Whereupon, there was held a short recess.)

THE COURT: The case of People versus Murray Kaplan.

The record will show that the defendant is represented by counsel. The People are present and represented. And the prospective jurors are all seated in the spectators section.

Swear the jurors, please.

(Jury voir dire.)

LOS ANGELES, CALIFORNIA, FRIDAY,
JANUARY 15, 1971 10:00 A.M.

THE COURT: The case of People versus Murray Kaplan.

The record will show the defendant is represented by counsel, the People are present and represented, the jurors are all seated in their respective places in the jury panel box.

Mr. Imhoff, do you wish to make an opening statement?

MR. IMHOFF: Yes, your Honor.

(Opening statement by City Attorney.)

THE COURT: Mr. McDaniel, do you wish to make an opening statement at this time?

MR. McDANIEL: No, your Honor. The defense will hold its opening statement until the conclusion of the prosecutions case and before we start into the defense of the case. So with your leave I will defer that statement until subsequently.

THE COURT: Very well, Counsel.

All right. You may call your first witness.

MR. IMHOFF: Thank you, your Honor. The People will call Sergeant Donald Shaidell.

MR. McDANIEL: I'll move to exclude the other officer, your Honor.

THE COURT: Very well. Do you wish to have all witnesses removed?

MR. McDANIEL: Yes.

THE COURT: Do you wish to address yourself to this motion?

MR. IMHOFF: No, your Honor. It's perfectly all right. All witnesses in the case will be excluded except those that are not testifying in this case.

THE COURT: All right. All witnesses in the case of People versus Murray Kaplan are ordered excluded from the courtroom and will be requested to wait outside in the hallway until they're called to testify.

DONALD D. SHAIDELL,

called as a witness by and on behalf of the People, having been first duly sworn, was examined and testified as follows:

THE CLERK: Would you state your name for the record, please.

THE WITNESS: Donald D. Shaidell, S-h-a-i-d-e-l-l.

DIRECT EXAMINATION

BY MR. IMHOFF:

Q Sergeant Shaidell, would you state your occupation, please.

A Yes. I'm a police officer for the City of Los Angeles, presently assigned to North Hollywood Detectives.

Q For how long have you been a police officer in the City of Los Angeles?

A In excess of 16-½ years.

Q On May the 14th, 1969, were you so employed?

A I was.

Q And to what division were you assigned at that time?

A I was assigned to Administrative Vice Division of the Los Angeles Police Department, and I was in charge of the Pornography or Anti-Obscenity Unit of that division.

Q For how long were you in that position?

A Approximately six years.

Q And other than when you were in Administrative Vice, how many years, if any, did you work as a vice enforcement officer?

A Approximately six years in Administrative Vice, exclusively in the field of obscenity investigations, and approximately 22 months—approximately two years as a vice investigator, general vice investigator, in Hollywood Division, Los Angeles Police Department.

Q Calling your attention again to May 14, 1969, did you enter a bookstore at 8818 West Pico Boulevard in the City of Los Angeles?

A I did.

Q At approximately 11:50 a.m.?

A I did.

Q And what was the name of this bookstore?

A I believe it's called the Peek-A-Boo.

Q And what was your purpose in entering the bookstore?

A The purpose was to investigate citizens' complaints regarding obscene matter being sold at that location.

Q And when you entered the store, Sergeant, what, if anything, did you observe?

A Well, as you enter the particular establishment known as the Peek-A-Boo, there are numerous magazines lining the walls, paperback books. There's a glass counter. There was artificial sex devices, commonly referred to as dildos or artificial penises. They were behind this counter where the clerk would normally be.

There was film and cardboard boxes behind the counter. The particular location—I was in there for approximately 30, 40 minutes. The material that was displayed was in the sex field exclusively, the magazines and the paperback books. It was void of any other type of material, such as U.S. News and World Report or Look, Life, or any other type of magazine such as this.

Q Could you describe generally the magazines you observed on the racks?

MR. McDANIEL: Well, I'd object to that, your Honor. We're trying a case involving three counts. I think this other material is surplusage and is irrelevant.

THE COURT: Overruled.

You may answer.

THE WITNESS: Generally, they were all of either single females totally nude on the covers of the magazines or a combination of males and females totally nude on the covers of the magazines, posed in different

positions. The particular books or—pardon me. The particular magazines would have a circle made out of paper which would cover the vaginal area of the female and the genital area of the male, generally, so it was not displayed. The sticker would cover it.

The paperback books, of course, were by numerous different titles. And they were further back in the store towards the rear as you enter through the front door.

The magazines would be almost immediately as you enter. They would be lying to your right as you enter. That particular area is all magazines.

Further back in the store, you get in the paperback books.

BY MR. IMHOFF:

Q Where was the counter located that you indicated had the films?

A As you enter, the counter then would be to your left and approximately ten feet inside the store and to your left against the left wall of the store as you're entering.

Q What, if anything, did you do when you entered the Peek-A-Book Bookstore?

A I perused several of the paperback books and the magazines. I was then told that this was not a library, by Mr Kaplan, at which time I started a conversation with Mr. Kaplan.

Q And what, if anything, did you say to him and he say to you?

MR. McDANIEL: Your Honor, may I approach the bench?

THE COURT: Very well.

(The following proceedings were had at the bench:)

MR. McDANIEL: Your Honor, with regard to any conversations that may have been had, I would need to ask some voir dire-examination questions to

determine if there was an issue where the constitutional rights should have been given and were not given. And I feel that that type of legal argument should be done out of the presence of the jury, because I think it's prejudicial to do it in front of the jury. But I think, to protect the rights of my client, it's important that I do it. So I request a hearing on this issue out of the presence of the jury.

MR. IMHOFF: Well, of course, this is purely an investigatory stage.

MR. McDANIEL: That has yet to be determined, your Honor.

MR. IMHOFF: There's no problem involved with —no Miranda rights, really.

THE COURT: Well, of course, that's the question presented.

Very well. It's now 18 minutes of 12:00. I'll excuse the jury, and we can have the argument outside their presence.

(The following proceedings were held in open court:)

THE COURT: Ladies and gentlemen of the jury, a question has been raised with regard to subject matter that must be determined outside the presence of the jury. It's now 17 minutes of 12:00, so I will excuse you for an early lunch. We will transact this business in your absence.

You're admonished that you're not to discuss this matter among yourselves nor with anyone else, nor are you to form or express any opinion thereon until the matter is ultimately submitted to you. You're excused at this time and ordered to report back to this courtroom at 1:30 p.m. without further order, notice or subpoena.

(The jury left the courtroom.)

THE COURT: The record will show that the jurors have left the courtroom and that all witnesses have left the courtroom.

MR. McDANIEL: Now, may I examine Sergeant Shaidell on voir dire to determine the issue here, your Honor?

THE COURT: You may proceed.

VOIR DIRE EXAMINATION

BY MR. McDANIEL:

Q Sergeant Shaidell, you testified that you went to the Peek-A-Boo Bookstore as a result of complaints from citizens; is that correct?

A That's correct.

Q Do you have those complaints with you here in court?

A No, sir, I do not.

Q Do you have any recollection of those complaints at all?

A Yes, sir.

Q Who was the person who complained?

A The way it originated—actually, it was sent to West Los Angeles Division because that was the particular area where the Peek-A-Boo Bookstore was located, and one copy to Administrative Vice Division. The original complaint came from Councilman Edelman's office on his stationery and was addressed to Chief of Police, and then it was forwarded to the particular divisions, as I remember this communique. It did list a person by name who had complained to the councilman pertaining to the Peek-A-Boo Bookstore, and I did not interview her. She was interviewed, I believe, by—I was told she was interviewed by West L.A. officers.

Q You don't know for sure about that part of it?

A Only what a fellow officer had told me, that he had interviewed her.

Q Do you have any way of determining a number to get a hold of this communique from the councilman's office and/or the complainant's name?

MR. IMHOFF: Object to that. I think this is irrelevant to the issues he wants to determine, your Honor.

THE COURT: What are you seeking to determine by this line of inquiry?

MR. McDANIEL: I'm just trying to get a picture of the reasons behind the entry, and I won't go into great detail, your Honor, in this issue. But I think we have to see this as pieces of a mosaic, to see if there's a pattern here that would raise the possible objections which your Honor is aware of.

THE COURT: How would this bear on your inquiry as to whether or not oral statements elicited from the defendant were a violation of his constitutional rights or not?

Mr. McDANIEL: Well, I will just try to go ahead, your Honor, and won't take any time on that particular one of the questions, if that's okay, because—

THE COURT: Very well. You may proceed.

MR. McDANIEL: —I really don't want to disclose my theory. I think that would give the other side the opportunity to cover their bridges, you see.

MR. IMHOFF: Is the objection sustained?

THE COURT: Well, then the objection will be sustained. I don't see what bearing that would have on this—

MR. McDANIEL: All right.

BY MR. McDANIEL:

Q Based on this information, were you assigned by your superior officers to go out to the Peek-A-Boo Bookstore yourself?

MR. IMHOFF: I object again, your Honor, as being irrelevant.

THE COURT: Overruled. You may proceed.

THE WITNESS: This is—I was in charge of the particular unit at that particular time. And communiques like that did come from the front office, and they were assigned—or they were given to me, but nobody ordered me: Shaidell, you go out and investigate this. I took it upon myself to do the investigation.

BY MR. McDANIEL:

Q You testified about numerous complaints earlier. Was it actually just the one complaint? You were erroneous in saying numerous complaints?

A No. And again—possibly we could clear this up. I think possibly the other sergeant has a copy of the communicate. I think that's the way it was elicited from Councilman Edelman's office, and he might have it in his briefcase. That's the way that I took it, plus the fact that talking to Officer Murphy who was working West L.A. at that time—he had stated he had received numerous other complaints.

Q I object to your going into what he said. That would be hearsay here, Sergeant.

MR. IMHOFF: Hearsay would be admissible for determination on—

THE COURT: You wanted to know how he made a determination that there were many complaints?

MR. McDANIEL: Yes.

BY MR. McDANIEL:

Q How did you make a determination that there were many complaints, if you did make such a determi-

nation? Was it made through communications with other police officers?

A Yes, sir.

Q And were those police officers Murphy and Piazza?

A Yes, sir.

Q Do you have any idea how many of these complaints there were?

A I would state only about three or four that we talked about, to my knowledge.

Q Now, previous to this material being brought to your attention, had you been aware of the Peek-A-Boo Bookstore yourself, by any other means?

A Yes, sir.

Q And had you been in the Peek-A-Boo Bookstore yourself previously?

A I had not.

Q Had other officers that you knew of been in the store previous to this?

A Yes, sir.

Q And did you discuss the situation with those other officers?

MR. IMHOFF: Your Honor, I object to this line of questioning as totally irrelevant to—

MR. McDANIEL: No, it is not, your Honor.

MR. IMHOFF: —to the area which we're probing.

THE COURT: Overruled.

You may answer.

THE WITNESS: Did I discuss it prior to my—me going in? Was that the question?

BY MR. McDANIEL:

Q Yes.

A Yes, sir.

Q Now, based on this information, did you have any information before you went into the store as to

Mr. Murray Kaplan being employed at the store or working at the store?

A Yes, sir.

Q And where did you get that information?

A I think I got it from two different sources; I think, number one, at Administrative Vice we were checking on different locations known as adult-type bookstores and who the owner was, through licensing. I also checked with West L.A. to ascertain if, actually, Mr. Kaplan was working in there, if he was actually working as well as being the proprietor of the location.

Q And you discovered that he was both; is that correct?

A That is correct.

Q Now, had other officers, before you went out there, produced any materials from this bookstore which you inspected yourself?

A Not which I inspected, no, sir.

Q But you had heard of them purchasing other materials?

A I believe so, yes, sir.

Q Now, when you went out to the store, it was in the furtherance of your purpose to institute a prosecution against Mr. Kaplan for a violation of 311.2 of the Penal Code, correct?

MR. IMHOFF: Object to that, your Honor; assumes a fact not in evidence and is leading.

THE COURT: Overruled.

Would you read the question?

(The question was read by the reporter.)

THE WITNESS: It was my purpose on going to that location—it was to investigate the possibility of such a violation existing; and if such a violation did exist, then that would be true. We would proceed with

initiating a complaint, if approval from the City Attorney's office was gained.

BY MR. McDANIEL:

Q I see. And before you even went into the store, it's fair to say, isn't it, Sergeant Shaidell, you had the already developed view that there would probably be a prosecution ensuing from this investigation?

MR. IMHOFF: Object to that as argumentative, your Honor.

THE COURT: Sustained.

BY MR. McDANIEL:

Q Did you have that particular point of view, based on your police experience and your investigation in mind, when you went in there?

MR. IMHOFF: Object again, your Honor, as irrelevant.

THE COURT: Overruled.

THE WITNESS: I felt that probably there would be material in there that would constitute a violation of the obscenity laws as I interpreted them.

BY MR. McDANIEL:

Q Now, when you went into the store, you, of course, did not advise Mr. Kaplan of his constitutional rights a la Miranda versus Arizona; is that correct?

A I did not.

Q And it was your purpose in discussing these things that you discussed with Mr. Kaplan to elicit admissions and statements which could be used against him in a court subsequently; isn't that correct?

MR. IMHOFF: Object to that, your Honor. That's argumentative.

THE COURT: Sustained.

You may rephrase your question.

MR. McDANIEL: All right.

BY MR. McDANIEL:

Q Sergeant Shaidell, when you did go into the location and initiated these conversations with Mr. Kaplan, was your purpose in eliciting these conversations to get statements and admissions from Mr. Kaplan which would then be subsequently used against him in a court of law if a complaint were issued?

MR. IMHOFF: Object, your Honor; assumes facts not in evidence, compound and is leading.

THE COURT: Overruled.

MR. IMHOFF: And irrelevant.

THE COURT: Overruled.

THE WITNESS: It was—my thinking was to elicit Scienter pertaining to something that I felt was obscene. That was my purpose, as required by the section.

BY MR. McDANIEL:

Q And then with this Scienter material, that would be in your mind in eliciting this? This would be material that you would then be able to use in a prosecution against the man; isn't that correct?

A That is correct.

MR. McDANIEL: Well, your Honor, based on that, I would move that any testimony regarding the statements be kept out on the basis that the whole reason for eliciting them was to further an already developed scheme in the investigating officer's mind to use this material against the man in a court of law in a prosecution based on what he has testified he already felt was a violation, and he did not advise him of his rights previous to this. I think that the statements would have to be kept out as being improperly obtained without a proper warning of his rights.

THE COURT: Do you wish to examine this witness?

The Court will reserve ruling on the motion.

MR. IMHOFF: Yes.

VOIR DIRE EXAMINATION

BY MR. IMHOFF:

Q Officer Shaidell, when you received this information and purchased the book, did you make an arrest of the defendant?

A I did not.

Q And why didn't you make an arrest of the defendant?

A It is the policy to submit to the City Attorney's office, City of Los Angeles, prior to making an arrest on this particular type of material, the material, and go by warrant of arrest where it is reviewed by city attorneys and also reviewed by judges of the court prior to the issuance of a warrant.

Q In other words, you don't make the determination to file a complaint or to make an arrest in a case like this?

A That's correct.

Q At the time that you went into the bookstore, you didn't know that the defendant, Mr. Kaplan, was selling obscene material. In other words? You don't make that determination?

A No. That's correct. I—without actually reviewing some of the stuff, I did not know for sure that he was selling something obscene.

Q In other words, the purpose of your going into the bookstore then was to investigate; is that correct?

MR. McDANIEL: Objection; leading the witness.

THE COURT: Sustained.

BY MR. IMHOFF:

Q What was your purpose then in going into the bookstore to make a purchase of a book?

MR. McDANIEL: Objection, your Honor. That's again leading, and, number two, it's been asked and answered previously.

THE COURT: Overruled.

You may answer.

THE WITNESS: My sole purpose was what—I am called an investigator. I went there to investigate.

BY MR. IMHOFF:

Q Had you drawn any conclusions that the defendant Murray Kaplan was in violation of 311.2 of the Penal Code?

A No. I had no proof that he was in violation without actually going there and looking at the material. *As I stated before, truthfully, in my mind I thought possibly there was a violation there.*

MR. IMHOFF: I have no other questions.

THE COURT: Sergeant Shaidell, on the date of May the 14th, 1969, at the time that you entered the Peek-A-Boo Bookstore, did you know Mr. Kaplan?

THE WITNESS: No, sir.

THE COURT: Did you know the person that you talked to at the time was Mr. Kaplan?

THE WITNESS: No, sir.

THE COURT: At the time that you spoke to—did it turn out that this person you spoke to was, in fact, Mr. Kaplan?

THE WITNESS: Yes, sir.

THE COURT: *When you spoke to Mr. Kaplan, had you actually formed an opinion in your mind that there were violations of Section 311.2 of the Penal Code being committed at that location?*

THE WITNESS: Your Honor, it was during this conversation with him that I formed this opinion. At one time he opened the book and read paragraphs out

of it. He showed me different magazines. So at this time—during the conversation with him I did form it, not prior, really.

THE COURT: *It was during the time of the conversation?*

THE WITNESS: *Yes, sir.*

THE COURT: And at the time that you formed the opinion that the violations of Section 311.2 of the Penal Code were being committed, did you form the opinion that Mr. Kaplan may have been committing these violations?

THE WITNESS: Yes, your Honor.

THE COURT: When did you determine that the individual that you talked to was, in fact, Mr. Kaplan?

THE WITNESS: Immediately after I exited the location, West L.A. Vice was there, and they had been in to ascertain who I was talking to.

THE COURT: This person that you talked to, before you started the conversation did he ever introduce himself by name?

THE WITNESS: No, sir.

THE COURT: Did you ever inquire of his name?

THE WITNESS: No, sir.

THE COURT: During the conversation did he indicate who he was?

THE WITNESS: No, sir.

THE COURT: Did you ever inquire as to who he was?

THE WITNESS: No, sir.

THE COURT: So the first time that you knew the person that you talked to was Mr. Kaplan was after you left the premises?

THE WITNESS: That's correct, your Honor.

THE COURT: Very well.

MR. McDANIEL: May I ask one other question, your Honor?

THE COURT: Very well.

FURTHER VOIR DIRE EXAMINATION
BY MR. McDANIEL:

Q Whether or not you knew what his name was, you did have the opinion, as you've testified, I think, Sergeant Shaidell, that—you formed the opinion that this individual was in violation of 311.2? You learned what his identity by name was subsequently; is that correct?

A I'm sorry, Mr. McDaniel. Will you—

Q Sure. I'll try to rephrase that for you.

As you indicated in questioning by Judge Aisenson here, you formed the opinion that the individual who you were dealing with in this series of conversations was in violation of 311.2, correct?

A That is correct.

Q You subsequently learned that his name was Kaplan?

A That is correct.

Q But before you learned that, you had already formed the opinion that he was in violation of the law, correct?

A During this conversation with him, that's correct.

MR. McDANIEL: Your Honor, then I would—
BY MR. McDANIEL:

Q And previous to the conversation, you already had a reasonable expectation in your mind that he was in violation of the State Penal Code, 311.2. Isn't that fair to say, Sergeant Shaidell?

MR. IMHOFF: Your Honor, I object. That calls for speculation, conclusion.

THE COURT: Sustained.

MR. McDANIEL: Based on this, your Honor, I would submit it is in violation of the Miranda warning and must be kept out. I don't think that the prosecution would want to see a reversal in a case of this nature on a technical point either, and I think that legally it's absolutely correct.

MR. IMHOFF: I disagree with counsel, your Honor, I don't believe that any violation of the defendant's constitutional rights has been violated here. The officer was merely conducting an investigation to gather evidence. The defendant had not reached the accusatory stage until, actually, after the officer left the bookstore—he found out who he was.

In this type of case, he wanted to give the defendant every opportunity to—by submitting the application to the City Attorney's office. He was not arrested at that time. No determination was made at that time to make an arrest. And he certainly could not be certain at this time that Mr. Kaplan was in violation of the law. It wasn't the determination of the police officer to make, as he's testified.

MR. McDANIEL: Your Honor, could I respond to that just briefly?

First of all, Sergeant Shaidell has indicated that he initiated these conversations to get evidence of Scinter, a part of the crime that we're dealing with here under 311.2. He indicated that his purpose was to get that information. That's why he started the questioning.

He determined that the person was in violation of the law, and, as far as he was concerned, as the officer doing this—it's fair to say that, as far as he was concerned, he was getting this to use against the man, form the opinion he was in violation of law. I think it's

abundantly clear that at that point the constitutional rights under Miranda would, of necessity, flow to the protection of this gentleman. It doesn't matter that he didn't know his name at that time.

THE COURT: Motion to suppress will be denied.

Court will be in recess. We'll reconvene at 1:30 p.m.

All parties and witnesses in the case of People versus Kaplan are excused and ordered to report back at 1:30 p.m. without further order, notice or subpoena. (There was held the noon recess.)

LOS ANGELES, CALIFORNIA,
FRIDAY, JANUARY 15, 1971

2:10 P.M.

THE COURT: The case of People versus Murray Kaplan.

The record will show the defendant is represented by counsel, the People are present and represented, the jurors are all seated in their respective places, and Sergeant Shaidell has resumed the witness stand.

DONALD D. SHAIDELL,
resuming the stand as a witness by and on behalf of the People, having been previously duly sworn, was examined and testified further as follows:

DIRECT EXAMINATION (RESUMED)

BY MR. IMHOFF:

Q Sergeant Shaidell, I believe we were at the point where, I recall, Mr. Kaplan approached you and you engaged in conversation; is that correct?

A That's correct.

Q Would you tell the Court what you said to Mr. Kaplan or what Mr. Kaplan said to you.

A Yes.

He stated that, "This is not a library. Can I help you?"

I said, "Yeah. Do you have any good sexy books?"

And he says, "All of our books are sexy." And so he—we were standing near the front of the store, and he picked a magazine off the rack and he opened it up and he said, "Look at this. You can see right inside her cunt." And he said, "Some of these only have the female alone and some of them have ones with the—with a guy and a gal, and they're screwing around," and general conversation such as that.

He then—after a few minutes more of conversation such as that, he went to the section where the books were located, paperback books, and he took a copy of a book that was called "I'm Curious Yellow," paperback edition. He stated that—he said, "This book is from the movie that will be shown in Los Angeles in a short time." He says that "It is presently playing in New York, and they're lining up at 7:00 in the morning to see this movie, "I'm Curious Yellow."

And he opened the book up. And there's a picture inside the book—there's photographs inside the book, as well as written text.

He opened it up to a page where there was an act of cunnilingus being performed, and he stated, "You know, everything's going to go pretty soon. I've seen some books that have come over from Denmark; and everything's going to be legal pretty soon." And—

That was the substance of his conversation at that time. So I took—Oh. Then I asked him about—"Well, how about some paperback books, you know? Do you have any real good ones?"

He said, "Hey, I'm reading one right now, and it's called Suite 69." And he said, "Look at this." And he took and he opened it up to page 84, 85, and he read a portion of it, using—well, the portion would probably be better read out of the book. I can't remember exactly which phrase without referring to my notes what he read. He read a portion of it out of page 84, 85. At this time we walked back over to the glass counter or the counter where the cash register was, and I purchased the magazine Yum-Yum which I had taken from the stand for, I believe, three ninety-five, and I purchased the paperback book known as Suite 69, I believe by I. Smithson. I purchased that and then I asked him about the films that were there,—that was behind the counter.

And he stated, "Well, black-and-whites are twelve fifty. The colors are \$25." He says, "You know, they show everything. They show the guy's dick and the gal's pussy."

"And," he says, "they show everything. It shows it right up to the point of where they're going to make it." He says, "It doesn't actually show the screwing"—was his phraseology. And, basically, this happened over a period of time.

After that, then I purchased the book and magazine, and I left the location where I wrote down what conversation that he said. I then transcribed it onto a form called the 15.7, departmental form.

And that was basically the extent of my one time in the Peek-A-Boo.

Q Do you recall what price you paid for the paperback book and magazine?

A The book was, I believe, a dollar ninety-five, and the magazine Yum-Yum—I think I paid—I think it was three sixty-five or three eighty-five.

MR. IMHOFF: I have here, your Honor, a book entitled—a magazine entitled Yum-Yum which I request be marked as People's 1 for identification.

THE COURT: It may be so marked.

MR. IMHOFF: And a paperback book entitled Suite 69 which I request be marked as People's 2.

THE COURT: It may be so marked.

MR. McDANIEL: Your Honor, with regard to both of those exhibits, I would offer to stipulate that those are the two items purchased by Sergeant Shaidell.

MR. IMHOFF: I would stipulate—be willing to stipulate that these two books are the two books that were purchased from Murray Kaplan, defendant in this case, on the date in question.

MR. McDANIEL: I would so stipulate.

THE COURT: All right. Pursuant to stipulation—

Ladies and gentlemen of the jury, both sides have stipulated that the two items were purchased by Sergeant Shaidell from the defendant at the date and time indicated. You are to consider the facts contained in the stipulation as established.

BY MR. IMHOFF:

Q In regard to the magazine Yum-Yum, did you have any conversation with the defendant with regard to that magazine?

A When I took the one Yum-Yum, the time that he was stating some of them have only the females and some of them have males and females—so I picked that one off the rack, and we were standing side by side and we went through it. We were commenting.

“I can't believe that.” And—that's the time where he went to get the book on Tropic of Cancer to show actually a sexual act of cunnilingus.

MR. IMHOFF: May I approach the witness, your Honor?

THE COURT: Yes.

BY MR. IMHOFF:

Q I call your attention, Officer, to page 84 and 85. Do you recall in there what you were referring to earlier when you said defendant read from the book?

A Yes, I believe so. If I could refer to my notes, I would make the positive passage that he did read. I believe, to the best of my knowledge, it's the second paragraph from the bottom on page 84.

THE COURT: You need your notes to refresh your memory?

THE WITNESS: Yes, your Honor.

THE COURT: All right. You may show him those notes.

Have you seen this document?

MR. McDANIEL: Yes, I saw that before.

THE WITNESS: Yes, that was the correct paragraph.

BY MR. IMHOFF:

Q And would you—

A Yes. He just read this one short paragraph that says: "‘Suck it, darling, oh, fuck my pussy with your tongue, sweetie,’ Gloria grunted, beginning to squirm her naked buttocks on the sheet as Maria’s fiery tongue inside her fervid cunt almost drove the young Negress into hysterics."

Q Thank you.

MR. IMHOFF: I have no further questions at this time, your Honor.

THE COURT: You may cross-examine.

MR. McDANIEL: Thank you, your Honor.

CROSS-EXAMINATION

BY MR. McDANIEL:

Q Sergeant Shaidell, how long has it been since you were working in the vice area?

A I left there in September of 1970.

Q Approximately how many adult bookstores were there when you left that area, the basic area that you cover which is the City of L.A.?

MR. IMHOFF: Object, your Honor. It assumes a fact not in evidence.

BY MR. McDANIEL:

Q If there are any.

THE COURT: With this modification, do you withdraw your objection?

MR. IMHOFF: Yes.

THE COURT: You may answer.

THE WITNESS: I don't know the exact number, but I would estimate probably in the neighborhood of 250, counting—that's all the divisions of the Los Angeles Police Department, the entire City.

BY MR. McDANIEL:

Q That doesn't include the County of L.A. areas that would be staffed by the Sheriff's office, for instance; is that correct?

A That's correct.

Q Now, you've seen, have you not, Sergeant Shaidell, many materials in some of these bookstores in the last 12-month period which graphically depict in photograph form sexual intercourse and oral sexual activity?

MR. IMHOFF: Object, your Honor, It's irrelevant.

MR. McDANIEL: I think it's not irrelevant, your Honor.

THE COURT: It's going beyond the scope of direct examination.

MR. McDANIEL: I could call him as my own witness. I don't want to force the officer to come back at a subsequent time.

THE COURT: May it be stipulated he may call the sergeant as his witness, or do you wish to—

MR. IMHOFF: I would have probably the same objections at that time, your Honor.

THE COURT: All right. The objection will be sustained as going beyond the scope of direct.

BY MR. McDANIEL:

Q Now, in terms of these 250 adult bookstores, of the ones you've been in, do they generally have the same type of display; that is to say, paperback books, magazines and films for sale, sexual devices?

MR. IMHOFF: Your Honor, I object to this as being irrelevant, going beyond the scope of the direct examination.

THE COURT: On the latter ground, the objection will be sustained.

MR. McDANIEL: I may have to ask the witness to come back at a subsequent time, under the circumstance.

THE COURT: Very well. That will be your prerogative, Counsel.

MR. McDANIEL: I don't have any questions on cross-examination at this time and would ask that Sergeant Shaidell, then, be available via phone call if and when I choose to call him as a defense witness, your Honor.

THE COURT: Very well.

Would you leave a number where counsel can contact you, in the event he would require you as a defense witness.

MR. IMHOFF: At this time, your Honor, I'd offer People's 1 and 2 into evidence.

THE COURT: Any objection?

MR. McDANIEL: No.

THE COURT: Very well. The items will be received bearing the numerical designation—

MR. McDANIEL: Your Honor, rather than saying no objection, may I rephrase that? I have a technical legal objection which I'd like to have noted and go into it at a subsequent time.

THE COURT: Do you wish to argue at the bench?

MR. McDANIEL: Yes. It will just take one moment.

THE COURT: Is Sergeant Shaidell excused?

MR. McDANIEL: I have no objection.

MR. IMHOFF: I'd like him to remain just a moment.

(The following proceedings were held at the bench:)

MR. McDANIEL: I just want to note an objection to the introduction of the evidence on the basis that it was obtained in part as a result of an accusatory technique of going into the store, attempting to get evidence to use against the man in a subsequent prosecution, and, therefore, constitutes material which was, in terms of the law, seized in violation of his Fourth Amendment and First Amendment rights. That's number one.

Number two, I would like to object to the introduction of that evidence against the defendant on the basis that that material is constitutionally protected, as shown by the case of Stanley versus Georgia and the cases of 37 Photographs and Norman Reidell, and

therefore cannot be used against the defendant in this prosecution. I'll submit it.

MR. IMHOFF: Well, the question of whether or not it's constitutionally protected is a fact determination that the jury and the Court make based on the law, so I think what you're trying to say again here is you want the Court to make a determination of obscenity which is not proper at this time. I think it's already been ruled on, that as far as the rights are concerned, they were not violated. The Court has ruled that his statements may come in where no Miranda rights necessarily were given.

MR. McDANIEL: Just briefly, the Stanley versus Georgia objection is not based on an analysis of whether or not the material is obscene. That's based on the principle that the First Amendment protects the dissemination of any form of material, including obscenity, to adults. And so I don't care to argue this motion any further than that. I'll submit it.

MR. IMHOFF: I would say that Stanley versus Georgia does not stand for that proposition. It's narrowly limited to private possession in one's own home. Stanley versus Georgia enforced the Roth position very specifically and held that Roth was still good law, and—

MR. McDANIEL: Stanley versus Georgia held, in its explicit holding, that this protection extends also to the right to receive any information or dissemination of any form, including obscenity.

Again, I'll submit it at that.

THE COURT: All right. The objection's overruled.

The exhibits will be received bearing the numerical designations assigned.

(The following proceedings were held in open court:)

THE COURT: Do you have any objection to the witness being permitted to leave at this time?

MR. McDANIEL: No, your Honor, as I indicated.

THE COURT: Thank you.

The record will show that the sergeant is giving a card to Mr. McDaniel.

MR. IMHOFF: At this time the People will call Sergeant Piazza.

SAMUEL J. PIAZZA,

called as a witness by and on behalf of the People, having been first duly sworn, was examined and testified as follows:

THE CLERK: Would you state your name for the Court, please.

THE WITNESS: Samuel J. Piazza, P-i-a-z-z-a.

DIRECT EXAMINATION

BY MR. IMHOFF:

Q Sergeant Piazza, what is your occupation, please?

A Police officer for the City of Los Angeles.

Q And how long have you been so employed?

A 12½ years.

Q And to what division are you presently assigned?

A I am presently assigned to Commissions Investigation Division.

Q And what was your assignment on or about May 15, 1969?

A At the time I was assigned to West L.A. Division, the Vice Unit.

Q And for how long a time did you serve in the West Los Angeles Vice Unit?

A 16½ months.

Q On May 15, 1969, did you enter a bookstore at 8818 West Pico Boulevard in West Los Angeles entitled the Peek-A-Boo Bookstore?

A Yes, I did.

THE COURT: What was the date, Counsel?

MR. IMHOFF: May 15th.

BY MR. IMHOFF:

Q And approximately what time of day or night was this?

A 1455 hours, I believe it was, which would have been 2:55 in the afternoon.

Q What, if anything, did you do when you entered the bookstore?

A I entered the bookstore through the front door. I noticed two male adults standing near the front of the store. I walked past them and looked at the east and the west walls of the building. I noticed there was racks of magazines, and they all appeared to be depicting males and females in the nude. The private parts and the breasts of the females were covered with tape.

One of the gentlemen in the front of the store approached me, and I told him I'd like to buy some film. "Do you have any good ones?"

He told me, "Sure." This individual was later to be identified as the owner, Murray Kaplan.

He walked around to the east side of the wall behind the counter. He reached up and removed a plain carton containing film, placed it on the counter, opened it up and said, "This has the best of color, shows a clear picture."

MR. McDANIEL: Your Honor, I'd object to any more testimony on this point until I can make a brief objection.

THE COURT: It would be the identical objection made previously?

MR. McDANIEL: Yes. I'd just have that noted.

THE COURT: Very well. I would appear at this time that the objection will be good. The objection will be sustained.

MR. IMHOFF: May I approach the bench briefly?

THE COURT: All right.

(The following proceedings were held at the bench:)

MR. McDANIEL: Do I understand the Court correctly that you're sustaining counsel's objection to any conversations that the—

THE COURT: I assume that you're introducing incriminatory statements?

MR. IMHOFF: I'm introducing—

THE COURT: Or are you just limiting it to the transaction involving the sale of the—

MR. McDANIEL: He's going to introduce incriminatory statements.

MR. IMHOFF: I'm going to introduce the conversation which took place between the officer and Mr. Kaplan which goes to—

THE COURT: This is the following day?

MR. IMHOFF: Yes.

THE COURT: All right. Would you make an offer of proof as to what statements you're—

MR. IMHOFF: The best that I can recall, the officer went in and he asked for some film, and he showed him, I believe, one film with a picture of two oriental girls in a photograph indicating what was in—

side the film, and then I believe the officer said he wanted a good one.

THE COURT: He wanted what?

MR. IMHOFF: A real good one, something like that. And he showed him another film called Tammy and Danny. I believe that's the name of the film. And he showed him the picture—

THE COURT: Well, what is Mr. Kaplan going to be saying, if you know?

MR. IMHOFF: Well, I think it will be words something like it shows—he says it shows everything but screwing or something like that, to that effect; that the film has, you know, a guy and a girl in various sexual—

MR. McDANIEL: That's potentially incriminating evidence on the Scierter point.

I think your ruling is proper that that must be kept out at this point.

MR. IMHOFF: There's no proof that—

THE COURT: Well, it's a transaction of sale.

MR. McDANIEL: Well, the purpose of those statements gets into incriminatory evidence, and I think your Honor's ruling, what happened previously—

MR. IMHOFF: This officer has not testified—

THE COURT: I'll limit you to eliciting statements regarding the transaction itself, to the purchase of the film. But you're to instruct the witness to delete statements of Mr. Kaplan indicating what is contained—

MR. IMHOFF: Please?

THE COURT: You're to delete statements of Mr. Kaplan indicating what is contained in the picture, what the picture depicts.

MR. McDANIEL: Thank you, your Honor.

MR. IMHOFF: Well, may I have a brief recess to

talk to my witness? I don't want to violate the Court's order here. He may say something that would be against the Court's order.

THE COURT: All right.

(The following proceedings were held in open court:)

THE COURT: Ladies and gentlemen of the jury, problems crop up quite frequently, so it will be necessary for us to transact a small portion of business outside the presence of the jury. As a consequence, I will excuse you at this time. As soon as the matter has been taken care of, we'll resume with the hearing.

You're admonished that you're not to discuss this matter among yourselves nor with anyone else, nor are you to form or express any opinion thereon until the matter is ultimately submitted to you.

We're in recess.

(The following proceedings were held in chambers:)

THE COURT: It's been stipulated, has it not, gentlemen, that spectators under the age of 18 are to be excluded from the spectators section?

MR. McDANIEL: When the exhibits are being viewed.

THE COURT: Is it your agreement that—only during that period of time?

MR. McDANIEL: Yes, I don't think it's necessary any other time.

MR. IMHOFF: I would prefer that it be—

THE COURT: What about the language—

MR. IMHOFF: I would prefer that it be during the entire trial, if we're going to have it during the—

THE COURT: Well, it's the defendant's motion, and so—

MR. McDANIEL: No. I think just during the showing of the exhibits is all that's necessary. I limit my stipulation to that.

THE COURT: Are you willing to agree to that?

MR. IMHOFF: Well, I can't see why. I can't see why we don't exclude them from the entire trial. Why does counsel just want to exclude them during the showing of the exhibits?

MR. McDANIEL: Because I believe in the principle of a free public trial. It's a constitutional guarantee.

MR. IMHOFF: So do I. But if it's because of the nature of the material, then we're going to be discussing this material quite a bit during the trial and showing it to the jury, and so forth. And I would think that counsel would be willing to have them excluded during the whole trial.

THE COURT: Well, I think that this is strictly within the—this motion is strictly within the province of the defense to make. And as a consequence, the Court has attempted to—I won't make that statement. But in any event, if that's as far as the defense wants to go, and it's their prerogative, that's the most the Court can get.

All right. Then are you willing to so agree? Well, then we won't have—

MR. IMHOFF: You mean agree to the under 18 during the exhibits only? Is that it?

THE COURT: I don't think I have the right to—

MR. IMHOFF: It's illegal to display harmful matter to minors. I mean that goes beyond obscenity, the legal definition of obscenity, as far as the statute 311.2.

MR. McDANIEL: Well, that's why I made the stipulation to the effect of whenever the exhibits are being shown at any time during the trial, then the

bailiff should be instructed to keep under 18 out. I think that takes care of the problem.

THE COURT: I guess I'll just research that section.

As I understand it now, the motion is strictly within the province of the defense to make. If the Court can do it on its own, I will.

So I'll permit you—I just won't consider the stipulation, then.

MR. McDANIEL: Could I go off the record for a moment, then?

THE COURT: Well, I don't see any point to that.

MR. McDANIEL: Well, if I could discuss it with you, I might be willing to—

THE COURT: In the interim, we have entered into a stipulation that the reporter need not transcribe the reading of the paperback novel, to wit, Suite 69?

MR. McDANIEL: Yes, that's been so stipulated by both sides.

MR. IMHOFF: So stipulated.

MR. McDANIEL: I would ask that that stipulation extend to any reading matter that I have read to the jury also.

MR. IMHOFF: In the event that the Court allows defense counsel to read any matters to the Court, I will stipulate that it need not be reported.

THE COURT: All right.

MR. McDANIEL: Now, if we're off the record—

THE COURT: All right.

(There was held a discussion off the record.)

MR. McDANIEL: Let me frame the stipulation this way.

I, as the defense in the case, would agree to a stipulation that people under 18 can be excluded from the

trial because of the Court's feeling that that is proper, although it's the defense that has the prerogative to make the motion. I'm making it out of deference to the Court's feeling; and I would stipulate on that basis.

THE COURT: Well, I don't want to place you in a position—I am not coercing you to enter into a stipulation that way.

MR. McDANIEL: Well, I'll make it even further. I'll make it clear, your Honor, that I'm not doing this of any feeling of being coerced but merely because of a feeling of deference to the Court's opinion. And I would not have any indication on the record that I feel like I'm being coerced into it at all. I categorically am not being coerced into it.

THE COURT: Well, you understand that the Court is not in any way attempting to place you in a position of doing something that you don't want to do; and if you feel that it's in your client's best interests not to enter into this stipulation, that you needn't do so.

MR. McDANIEL: Yes, I understand that. And I'm still willing to enter into the stipulation.

THE COURT: And are you willing to join in the stipulation?

MR. IMHOFF: Yes, your Honor.

THE COURT: Very well. So ordered.

MR. IMHOFF: I would also ask that neither counsel make any comment in the presence of the jury about the fact that people under 18 are being excluded.

THE COURT: Is that agreeable, gentlemen?

MR. McDANIEL: Sure.

(The following proceedings were held in open court:)

THE COURT: Case of People versus Murray Kaplan.

The record will show that defendant is represented by counsel, that the People are present and represented, and Sergeant Piazza has resumed the witness stand.

You may proceed.

MR. IMHOFF: Thank you, your Honor.

SAMUEL J. PIAZZA,

resuming the stand as a witness by and on behalf of the People, having been previously duly sworn, was examined and testified further as follows:

DIRECT EXAMINATION (RESUMED)

BY MR. IMHOFF:

Q Sergeant Piazza, I believe we were at the point where Mr. Kaplan had approached you.

Now, would you please answer my questions specifically. What, is anything, did you say to Mr. Kaplan?

A I stated I would like to buy some film. "Do you have any good ones?"

Q What, if anything, did Mr. Kaplan do at that time?

A At this time he walked around to the east wall behind the counter and removed from a shelf a plain cardboard package containing film, placed it on the counter, opened it up, and showed me a colored picture of two female orientals in the nude. They were in a reclining position.

And what, if anything, did you say at that time or do?

A I stated, "Well, I want a good one."

Q What, if anything, did he do?

A At this time he went back to the shelf, removed another film which had the title Tammy and Danny on the flap. He removed a colored photo from that

packet that had a male and a female in the nude in a reclining position.

Q And what, if anything, did you do then?

A At that time I verified that it was 8 millimeter film and paid him \$26.25 and left the location.

MR. IMHOFF: Your Honor, I have a film box, white cardboard box, which I'd like marked as People's 3 for identification.

THE COURT: It may be so marked.

BY MR. IMHOFF:

Q Officer, I show you this film box. Do you recognize that box?

A Yes, I do. This is the box that I had purchased the day in question.

Q Would you describe what, if anything, it says on the outside of that box.

MR. McDANIEL: I'll stipulate that this is the film purchased, your Honor.

THE COURT: Very well. Are you willing to so stipulate?

MR. IMHOFF: Yes, but—I'll stipulate this is the film that was purchased on the date in question from the defendant in this case, Mr. Kaplan.

THE COURT: Is that agreeable?

MR. McDANIEL: Certainly.

THE COURT: Ladies and gentlemen of the jury, pursuant to stipulation, the parties have agreed that the box in question marked People's 3 is the item purchased from Mr. Kaplan. By reason of the stipulation, you are to consider that as an established fact.

Very well.

MR. IMHOFF: Thank you.

BY MR. IMHOFF:

Q Officer, would you open the box.

A Yes, I will.

Q And would you describe for the Court what is inside the box.

A Inside this box is a red reel with film and the photograph that was shown to me by Mr. Kaplan at the time of purchase. This was the photograph that was removed from the box at the time.

MR. IMHOFF: I'd request that the photograph be marked as People's 4 for identification and the reel of film as People's 5.

THE COURT: The photo will be marked People's 4 for identification. The reel of film will be marked People's 5.

MR. IMHOFF: At this time I would offer People's 3, 4 and 5 into evidence.

MR. McDANIEL: Now, I would object to the introduction of these on the same grounds previously stated. I don't wish to reassert the grounds but merely note the objection.

THE COURT: Very well. The objection is overruled.

The exhibits will be received bearing the numerical designation assigned.

You may proceed.

MR. IMHOFF: I have no further questions at this time.

THE COURT: You may cross-examine.

CROSS-EXAMINATION

BY MR. McDANIEL:

Q Sergeant Piazza, do you work in vice investigation now?

A No, I do not.

Q Did you ever work in vice investigation?

A When I was assigned to the West L.A. Vice Unit, I was, yes.

Q How much time did you spend in that occupation?

A Approximately 16½ months.

Q And did you visit a variety of adult bookstores during that period of duty?

MR. IMHOFF: Object, your Honor, as irrelevant, beyond the scope of the direct.

THE COURT: On the latter ground, the objection will be sustained.

MR. McDANIEL: Well, then I would merely ask also that this officer remain on call for me to call as my own witness for the defense of the case subsequently.

THE COURT: Very well.

Sergeant Piazza, would you remain available as a witness in this matter?

MR. McDANIEL: I don't mean the sergeant needs to remain in the building, as long as I can get a telephone number.

THE COURT: Will you leave a telephone number where counsel can contact you.

Sergeant Piazza, is this Peek-A-Boo Bookstore located in the City of Los Angeles?

A Yes, it is.

THE COURT: Anything further?

BY MR. McDANIEL:

Q This item was openly for sale in the store, is that correct, sir?

A Yes, it would be.

MR. McDANIEL: I don't have any other questions at this time.

THE COURT: Very well.

Thank you very much. You're excused at this time, but remain on call.

MR. IMHOFF: People would request permission at this time to show the exhibits to the jury.

THE COURT: Very well. We have one matter that was discussed in chambers.

May I see both counsel at the bench for just a moment?

(Discussion at the bench without the presence of the reporter.)

(The following proceedings were held in open court:)

MR. McDANIEL: Your Honor, out of kindness of my heart, I will volunteer to help them run the machine.

THE COURT: Very well.

(Whereupon, the film was shown to the jury.)

MR. IMHOFF: May I pass this picture among the jurors?

THE COURT: Very well. You may, People's 4. Have all the jurors viewed People's 4?

Very well. The record will show that all indicate in the affirmative.

MR. IMHOFF: At this time, your Honor, I'd request permission to show the magazine to the jury. However, it would be necessary to set up that equipment that we spoke about before.

THE COURT: May I see both counsel for a minute?

(The following proceedings were held at the bench:)

THE COURT: Now, before I rule, will this be available to the defense for purposes of showing their

materials, if and when they wish to make such introduction?

MR. IMHOFF: I can't say that, your Honor, because—and this is the reason. As I said before, the equipment belongs to the Police Academy which they use every day down there. And I have a very difficult time getting it for one day.

THE COURT: Would you put in a reservation if counsel gives you advance notice?

MR. IMHOFF: I don't know if I can. I can't say at this time.

THE COURT: Is it Sergeant Piazza who obtains this or—

MR. IMHOFF: Either one. It's Administrative Vice Division who gets it for me from the Police Academy, and they're very reluctant for it to be used, period.

THE COURT: See, I'm not concerned about the use of the projection device, which, for the record—it would appear that this is a wide-angle lens which illuminates and projects the images of the pages of the magazine onto a screen. I'm concerned about defense's position. This is an unfair showing. But I do think that it would probably place the defense in a position of disadvantage if the People are permitted to use this vivid form of portrayal and they are not. And since I cannot get a representation that the device will be available in the event that the defense is permitted to portray other materials to the jury, I think that would be a disadvantage, if a similar method is not available for them to portray their magazines or other comparable—

Well, I'm not making an advance finding. But should they be permitted to display similar material when the defense is put on, I think it would be a disadvantage. It might, in comparison, unduly portray the

People's material, and there might be an unfairness in comparison of the two methods of presentation.

As a consequence, I'll not permit the use of the projector for the People.

You'll just have to let the jury look at the magazine. So we'll just pass it around and let them spend the afternoon reading the magazine.

MR. McDANIEL: Thank you, your Honor.

MR. IMHOFF: Could it be stipulated, then, in the event that counsel is permitted to introduce comparable material, that defense counsel will not at that time attempt to use any kind of projection?

THE COURT: The Court will not permit either—it will either permit both sides or neither side—

MR. IMHOFF: May I say something else?

The magazine is only, I think, about 12 or 14 pages. I forget exactly. Mostly photographs, but there is some writing in the beginning, and in the back, I think, there is some advertising.

THE COURT: I'll instruct the jurors to read the entire magazine.

MR. IMHOFF: Could we have a reader read the portion to them and then hold it up, you know, page by page, in front of them, or would you prefer to just pass it around and let them—

THE COURT: I can instruct them to read the entire magazine and look at all the pictures.

MR. IMHOFF: All right.

(The following proceedings were held in open court:)

THE COURT: Ladies and gentlemen of the jury, we're now going to pass the item which has been

marked People's 2 (sic) to the jury. There's only one copy. And it will be your duty to read the entire magazine and see all of the pictures contained therein. I understand there is some writing in the front portion and in the back portion.

MR. IMHOFF: Inside the first page, there is some writing, and then within the last two pages there is some writing, mostly advertising. The rest is all pictures.

THE COURT: All right.

You are to read the magazine in its entirety and look at all the pictures.

We might start off with juror No. 1. And when you're finished with it, pass it onto juror No. 2, et cetera.

While the jury is reading the magazine, I'll see counsel in chambers.

(Whereupon, there was held a short recess.)

THE COURT: Ladies and gentlemen of the jury, did all of the jurors read the item marked People's 1?

The record will show all have indicated in the affirmative.

Very well. Are you ready to proceed?

MR. IMHOFF: Yes, your Honor.

At this time the People will proceed with the reading of the book Suite 69.

THE COURT: Do you have a professional reader?

MR. IMHOFF: I have a very professional reader, your Honor, Mr. Helphand from our office.

May Mr. Helphand use the witness box? Would that be—

THE COURT: All right.

Would you assume the witness box, Mr. Helphand?
Would you please rise and be sworn.

RICHARD J. HELPHAND,

called as a witness by and on behalf of the People, having been first duly sworn, was examined and testified as follows:

THE CLERK: State your name for the record, please.

THE WITNESS: Richard J. Helphand.

THE COURT: Very well.

For the record, Mr. Helphand will read the contents of what's been marked People's 2, a paperback book entitled Suite 69 by I. Smithson.

Start with the introduction, please.

(The book was read to the jury.)

THE COURT: Perhaps this might be an opportune time to interrupt the presentation. We'll have to wait until Monday for the continuation of the story, ladies and gentlemen.

You're admonished that you're not to discuss this matter among yourselves nor with anyone else, nor are you to form or express any opinion thereon until matter is ultimately submitted to you.

Since we're going to be separated for a weekend, the admonition becomes even more meaningful, since you'll have more opportunity to be tempted to discuss this matter with someone at your home or a neighbor.

As a consequence, I'm going to urge you to avoid any such contact, and this would include other jurors with whom you serve or who were possibly in the group or panel from which you were drawn. I have noticed that some of our former jurors have been in the spectator section. So as a consequence, it's going to be difficult for you. But in order for you to perform your duty in the most conscientious fashion, you'll have to adhere to the Court's admonition.

You're excused at this time and ordered to report back Monday morning, the 18th of January, at 9:15 a.m. without further order, notice or subpoena.

(The jury left the courtroom.)

THE COURT: Pursuant to stipulation, People's 2 may be withdrawn from evidence and placed in the possession of Mr. Imhoff who will return the item Monday morning.

The record will show that this is for the purpose of giving his expert an opportunity to read the volume so that he may prepare for his testimony.

MR. McDANIEL: I take it that you won't attempt to deface it or change it in any way.

MR. IMHOFF: Absolutely not, Counsel. The problem that came up was I had one of my experts read it who will be unable to testify, and so I have another one who has read most of the book, but there's a small part of it he hasn't finished. And so that's the reason.

MR. McDANIEL: It doesn't matter to the defense.

MR. IMHOFF: Thank you.

(Recess.)

LOS ANGELES, CALIFORNIA,
MONDAY, JANUARY 18, 1971
9:50 A.M.

THE COURT: The case of the People versus Murry Kaplan.

The record will show the defendant is represented by counsel, the People are present and represented, the jurors and alternatives, with the exception of juror No. 4, Miss Isabel Maymudes, and juror No. 9, Mrs. Sylvia Green, are present.

Ladies and gentlemen, Miss Maymudes and Mrs. Green have called in ill and are not able to come today. For that reason, we're going to excuse them from further appearance and order Mrs. Freeman to fill seat No. 4 and Mr. Mann to take seat No. 9 in place—Mrs. Freeman in place of Miss Maymudes and Mr. Mann in place of Mrs. Green.

I will now caution the balance of the jurors that, since we have no reserves, sickness will not be permitted in the future.

Very well. At the close of session Friday, we concluded the first chapter of People's 2.

You've previously been sworn, Mr. Helphand, and you're still under oath. Would you resume reading the book.

Please start with—I think it's Chapter 2.

(Whereupon, the book was read to the jury.)

THE COURT: This might be an appropriate time to take our morning recess.

You're admonished, ladies and gentlemen, that you're not to discuss this matter among yourselves nor with anyone else, nor are you to form or express any opinion thereon until the matter is ultimately submitted to you.

Court will be in recess.

(There was held a short recess.)

THE COURT: Case of People versus Murray Kaplan.

The record will show the defendant is represented by counsel, the People are present and represented, the jurors are all seated in their respective places in the jury panel box, and Mr. Helphand has resumed the stand.

You may proceed, Mr. Helphand.

(The book was read to the jury.)

THE COURT: This might be an appropriate place to take a break. We'll have our lunch recess at this time.

Ladies and gentlemen, you're admonished that you're not to discuss this matter among yourselves nor with anyone else, nor are you to form or express any opinion thereon until the matter is ultimately submitted to you.

You're excused at this time and ordered to report back at 1:30 p.m. this afternoon without further order, notice or subpoena.

All parties and witnesses in the case of People versus Kaplan are excused and ordered to report back at 1:30 p.m. without further order, notice or subpoena.

(There was held the noon recess.)

LOS ANGELES, CALIFORNIA,
MONDAY, JANUARY 18, 1971
1:40 P.M.

THE COURT: Case of People versus Murray Kaplan.

The record will show the defendant is represented, by counsel, the People are present and represented, the jurors are all seated in their respective places in the jury box. Mr. Helphand has resumed the witness stand.

I believe you left off on page 114. You may resume.

(The book was read to the jury.)

MR. IMHOFF: Your Honor, may I pass the book among the jury to see the few pictures there are in the back and the ads?

THE COURT: Surely this might be an appropriate

time to have our midafternoon recess. When the recess is concluded, the book can be passed among the jurors.

You're admonished that you're not to discuss this matter among yourselves nor with anyone else, nor are you to form or express any opinion thereon until the matter is ultimately submitted to you.

The Court will be in recess. We'll reconvene at a quarter after.

(There was held a recess.)

THE COURT: Case of People versus Murray Kaplan.

The record will show the defendant is represented by counsel. People are present and represented. The jurors are all seated in their respective places in the jury panel box.

The Court will call the attention of the jurors to the material which can be designated as advertising material after the end of the text from page 180 on.

Would you pass it to juror No. 1.

As you view the material, pass it on to the next juror.

MR. IMHOFF: May I ask the jury to also read the front cover? I don't believe that was read.

THE COURT: All right. Read the front cover, as well.

MR. IMHOFF: Thank you.

THE COURT: The record will show that the jury has perused the exhibit marked People's 2.

Ladies and gentlemen of the jury, counsel has an opportunity to make an appearance before the Supreme Court in Washington, D.C., and, as a consequence, will be gone Tuesday and Wednesday. We'll reconvene Thursday.

In order to maintain the continuity of presentation, this might be an opportune time to take a break in

the evidence. Therefore, you're admonished that you're not to discuss this matter among yourselves nor with anyone else, nor are you to form or express any opinion thereon until the matter is ultimately submitted to you.

By reason of the fact that we're going to have this two-day recess in this case, the admonition becomes doubly important for reasons that I have already outlined to all of the jurors.

You're excused at this time and ordered to report back to this courtroom on Thursday, the 21st of January, 1971, at 9:15 a.m.

(The jurors left the courtroom.)

THE COURT: The record will show that the continuance was argued in chambers, in order to give the city attorney an opportunity to preserve its record and give an opportunity to delineate his objection thereto for the record.

MR. IMHOFF: Thank you, your Honor. People would have to, for the record, interpose an objection to the continuance—the recess of the case until Thursday, the 21st. I understand what a great opportunity it is for defense counsel to go to Washington to see the Supreme Court in action and to be admitted personally. However, under the circumstances, it would mean that the People, this attorney for the People, would be with two days of time in which I could not start another trial; and the continuity of the case also is interrupted by the recess.

Therefore, I have to make my objection known, for those reasons.

THE COURT: Very well. The Court has felt that this was a matter of urgency that takes precedence; therefore, has granted the motion.

MR. McDANIEL: I appreciate that, your Honor. I'd like to indicate that I know Mr. Imhoff himself doesn't have any personal objection to it. I understand why he must make the objection for his office, and I realize it does create a problem. But I do appreciate the Court's granting the delay.

MR. IMHOFF: The People appreciate and understand the Court's position in this matter.

THE COURT: Very well.

MR. IMHOFF: People's 2 was withdrawn, by stipulation, from evidence last night. I would like for the record to reflect that it was returned to the clerk this morning by the People and has been used in the course of the proceedings today. And defense counsel has indicated he would like to withdraw it for the purpose of a prospective witness reading it for testimony in this trial.

People would stipulate that defense counsel could do so, if it is all right with the Court.

THE COURT: Pursuant to stipulation, People's 2 may be again withdrawn from evidence and placed in the custody of defense counsel who will return it Thursday morning.

MR. McDANIEL: Thanks very much, your Honor.

MR. IMHOFF: Thank you.

THE COURT: All right. Court's in recess.

(Recess.)

LOS ANGELES, CALIFORNIA,
THURSDAY, JANUARY 21, 1971

9:40 A.M.

THE COURT: Case of People versus Mufray Kaplan.

The record will show the defendant is represented by counsel, the People are present and represented.

All jurors, with the exception of Mr. Higa, are seated in their respective places in the jury box.

Ladies and gentlemen of the jury, despite the Court's severe admonition against future illness, it appears that Mr. Higa has violated this injunction and cannot appear today. As a consequence, we have no alternative but to continue the matter until tomorrow. It's anticipated that he will return tomorrow and we'll be able to proceed with this case. I know that every day that we don't proceed adds another day of service. We had two alternates, as you recall; and due to illness we had to empanel them in the regular panel, and we've run out of alternates. This is a rare and unusual occurrence. However, it doesn't appear that there's anything we can do about it. As a consequence, we'll have to recess until tomorrow morning at 9:15.

You're all ordered to report back at that time and date without further order, notice or subpoena. Again, you're admonished that there will be no future illness.

(Whereupon the Kaplan case was adjourned this date.)

LOS ANGELES, CALIFORNIA,

FRIDAY, JANUARY 22, 1971

10:30 A.M.

THE COURT: Case of People versus Murray Kaplan.

The record will show that defendant is represented by counsel, the People are present and represented, the jurors are all seated in their respective places in the jury panel box.

It appears, Mr. Higa, you did not abide by the Court's admonition with regard to sickness. In the future, be careful about that.

All right, you may proceed.

MR. IMHOFF: Thank you.

At this time, your Honor, the People will call to the stand Officer Hugh Blackwell.

HUBERT E. BLACKWELL,

called as a witness by and on behalf of the People, having been first duly sworn, was examined and testified as follows:

THE CLERK: Would you state your name for the Court, please.

THE WITNESS: Hubert E. Blackwell, B-l-a-c-k-w-e-l-l.

DIRECT EXAMINATION

BY MR. IMHOFF:

Q Mr. Blackwell, would you state your occupation, please.

A Police officer for the City of Los Angeles.

Q And to what division are you assigned?

A I'm assigned to Vice Investigation Division, Pornography Unit.

Q How long have you been employed as a police officer for the City of Los Angeles?

A It will be eight years, April.

Q And how long have you been assigned to the Vice Investigation Division?

A 16 months.

Q And prior to your assignment to Vice Investigation Division, what division were you assigned to?

A I was assigned to a divisional vice unit in North Hollywood for 20 months.

Q And what are your duties as an investigator assigned to Vice Investigation Division?

A I have City-wide jurisdiction in the investiga-

tion of persons involved in the distribution, exhibition, productions or sales of alleged obscene matter or conduct. I also have responsibility of the coordination and inspection of the 17 divisional vice units in regards to obscene matter and conduct. I have close liaison with other law enforcement agencies, such as the Attorney General's office, the postal inspectors, alcoholic beverage control, other City and District attorneys, other police departments, Sheriff's departments, the FBI. I also gather intelligence information pertaining to the involvement of organized crime in obscene matter and conduct.

Q Have you ever or do you now teach or instruct in the area of obscenity?

A Yes. I'm assigned as an instructor at the Los Angeles Police Academy in the area of obscenity and pornography.

Q Did you ever take a survey or tour of the State of California?

A Yes, sir, I did. In March of 1970, I, along with two fellow officers, Sergeant Radesky and Officer Petroski, took a survey of the State of California where we visited 20 cities and 19 counties.

MR. McDANIEL: Your Honor, I'll object to narrative answers such as this.

THE COURT: It appears to be in response to the question. The objection will be overruled.

You may proceed.

BY MR. IMHOFF:

Q What was the purpose of taking the tour?

A Attempt to find the contemporary community standards of the State of California.

Q Well, where did you conduct this survey?

A As I said, this survey was conducted in 20 cities and 19 counties throughout the State, geographically

located all the way from Eureka to the north to San Diego to the south, Santa Barbara to the west, and Tahoe City to the east.

Q What kind of persons did you survey, in regard to their ages and occupations?

A There was various occupations, over 250. They were all the way from doctors, lawyers, to what we might call a professional student, 28 or 29 years old that hasn't been employed, welfare recipients, widowers on welfare and Social Security. The age limits went from 20—and our survey, I might add—I don't know what the oldest person was, but the only time we asked age, when it was obvious that they were either in the late 30's or early 40's, because there was a breakdown at that point, 20 to 40 and over 40. So I can only presume, maybe around 60.

Q Well, how many people did you talk to on the survey?

A I surveyed and spoke with 600 people. Altogether on the survey trip, I'd have to estimate approximately a thousand.

MR. McDANIEL: I'd move to strike the second part of the answer, your Honor, and ask that the jury be admonished to not regard it since it's not responsive.

THE COURT: Would you read the question, please.

(The question was read by the reporter.)

MR. McDANIEL: He testified he talked to 600. Anything after that should go out.

THE COURT: Overruled. The answer may stand.
BY MR. IMHOFF:

Q How many total people were surveyed in the survey?

A Between the three officers, there was a total of 1800. I personally surveyed 600.

Q And where were these people located when you conducted your survey?

A In front of supermarkets or in supermarkets.

Q Did you obtain written interviews, interpret and compile the results?

A Yes, sir, I did.

Q Did you observe entertainment on your survey in bars and cocktail lounges, materials displayed in bookstores in other parts of the State, different parts of the State?

A Yes, sir, I did. In each city that we visited and surveyed, we would go to the prosecution agency or the law-enforcement agency and see if they had any of this type of material. When I say "this," I mean the bookstores or bottomless or topless entertainment, and see what they felt was the problem, their biggest problem in that city.

Q Have you conferred with prosecution, defense attorneys or psychiatrists or psychologists in this area?

MR. McDANIEL: Object; multiple, your Honor.

THE COURT: Sustained.

BY MR. IMHOFF:

Q Have you conferred with prosecution attorneys in regard to this area?

MR. McDANIEL: Objection; irrelevant.

THE COURT: Overruled.

THE WITNESS: Yes, sir, I have talked to numerous prosecution agencies around the State.

BY MR. IMHOFF:

Q And have you conferred with any psychiatrists or psychologists in regard to this area?

A Yes, sir. I've had lengthy discussion with Dr. Wagner, who is an M.D., a psychiatrist, and was the head psychiatrist of Atascadero State Hospital for the mentally insane.

Q And have you also conferred with defense attorneys in the course of your work in regard to this area?

A Yes, sir, I have.

Q Have you familiarized yourself with the case law in the area of obscenity?

A Yes. I am generally familiar with major case law decisions in the area of pornography and obscenity.

Q Have you ever attended any lectures or workshops or seminars in the area of obscenity?

A Yes, sir, I have. I've attended meetings of the Attorney General's Advisory Subcommittee on Pornography and Obscenity. I've also attended to two-day seminar in the City of Coronado in San Diego County where law enforcement from all over the State of California and prosecution agencies from all over the State of California gathered; and information was exchanged regarding views projected from citizens to law enforcement people as to what pertains to a prurient interest or what goes beyond the contemporary community standards of decency.

Q Based on your experience and your training and research, did you form an opinion as to the contemporary standards of the average person in the State relating to prurient appeal and the customary limits of candor in representation or depiction of nudity, sex or excretion?

A Yes, I did.

Q In the course of your investigations and work, is it necessary for you to be able to recognize what material appeals to prurient interest?

MR. McDANIEL: I would object to that, your Honor. That's a question without proper foundation.

THE COURT: Overruled.

You may answer.

THE WITNESS: I'm sorry. I forgot the question, your Honor.

(The question was read by the reporter.)

THE WITNESS: Yes, it is. In my present assignment, I have received, investigated, advised and observed hundreds of citizens' complaints that have—came through our office in regards to films, brochures, books, magazines that describe nudity or sex in such a manner that appeals to a prurient interest or confronts the contemporary community standards.

BY MR. IMHOFF:

Q Have you ever testified in court in California as an expert witness in the area of contemporary community standards or prurient interest?

A Yes, sir, I have.

MR. IMHOFF: May I approach the witness, your Honor?

THE COURT: You may approach the witness.

BY MR. IMHOFF:

Q Officer, I show you People's 1. Have you seen this magazine before?

A Yes, sir, I have.

Q And have you examined that magazine?

A Yes, sir, I did.

Q And when did you examine the magazine and read it?

A It was Monday the 18th.

Q Officer, assume that this magazine was sold on May 14, 1969, in a bookstore in the City of Los Angeles at 8818 West Pico Boulevard to an adult.

After having examined this magazine, based upon your experience and your training and research, do you have an opinion as to whether the material, taken as a whole, has a predominant appeal to the average

person, applying contemporary standards to a prurient interest, that is, a shameful or a morbid interest in nudity, sex or excretion?

A Yes, sir, I do.

Q And based upon your experience, training and research, do you have an opinion as to whether the matter taken as a whole goes substantially beyond the customary limits of candor in depiction or representation of such matter?

A Yes, I do.

Q And what is your opinion?

MR. McDANIEL: I'd object, your Honor. I don't think he's shown sufficient foundation to testify as an expert witness in this field.

THE COURT: Overruled.

MR. McDANIEL: May I take him on voir dire, then?

THE COURT: You may take him on voir dire.

MR. McDANIEL: All right. Thank you.

VOIR DIRE EXAMINATION

BY MR. McDANIEL:

Q Officer Blackwell, you started this survey in March '70; is that right?

A Yes, sir, March 2nd, I believe.

Q How much time were you engaged in the survey?

A 29 actual survey days. Our surveying days, I believe, ended on April 17th.

Q And I believe you said you had talked to 600 people; is that right?

A I surveyed 600 people, sir, interviewed and surveyed.

Q Now, did you talk to each of these people individually or were they in groups?

A No, sir. The 600 that I surveyed were talked to individually.

Q Where did you conduct your first interview?

A What city, sir?

Q Yes.

A The City of San Diego.

Q And what location in that city did you conduct it at?

A I do not know what market it was, sir. We visited three markets in each city, an attempt to get three supermarkets in each city.

Q Were the other two officers at this same market in San Diego where you conducted your first interview?

A Yes, sir, they were.

Q Were they together with you or were they physically separate in the parking lot?

A They were separated, sir. We attempted to cover—most of the markets have two or three entrances. We attempted to cover each one of the entrances or exits.

Q Approximately how much time did you spend talking with the first person that you interviewed?

A I have no idea of how much time I spent with each person, sir. It averaged maybe five minutes on some people to 15 or 20.

Q Was the format for your interview exactly the same at each time that you interviewed people during the survey?

A Yes.

Q Did you hand them a copy of your survey questionnaire before you started asking questions?

A No, sir. At no time did I hand them the questionnaire at all.

Q How did you introduce yourself to the people?

A Identified myself as a police officer, and my name, from Los Angeles.

Q Did you have any occasions during this period of time when—after you identified yourself as a policeman that somebody would just get up and take off running or anything like that?

MR. IMHOFF: I object to that, your Honor; calls for speculation, is irrelevant.

MR. McDANIEL: I don't know if it calls for speculation. Either it happened or it didn't happen. If he doesn't know, it shows—

THE COURT: Counsel, just state the fact that you object. The Court will not permit you to present argument in the presence of the jury.

The objection will be overruled.

You may answer the question.

THE WITNESS: On two occasions I had people that did not have time or something of this nature. They said they were on a break or only had a half hour for lunch and stopped in to grab a bottle of pop or something of this nature that didn't have time to talk.

BY MR. McDANIEL:

Q After you identified yourself as a police officer from Los Angeles, did you then explain what your purpose was to the person you were talking to?

A Yes, sir, basically.

Q How is your explanation given? Give me the exact terminology that you used in each case.

A Well, exact—I can give you basically what was said in each case, sir. As far as exact, I couldn't say. I might throw an “an” or a “a” in somewhere.

Q That's no problem. Substantially.

A I would see a person or approach a person, say, “Excuse me. I'm Officer Blackwell, police officer, City of Los Angeles. If you have a few moments, I'd like to speak with you. I'm conducting a survey on obscenity.”

And you could usually tell right then if the people were going to be receptive or not. Most everybody was. As I say, at this point the people would be interested and usually ask us, Why are you here, you know; What are you doing up in San Diego, or some place like this.

Q What would you say to that?

A At this time I'd say, "Due to the recent court decisions, we have to have an expert in obscenity. And we're trying to find out the contemporary community standards of your community that you live in."

Then I would basically tell them that we have an 11-question questionnaire, and it would take approximately three to five minutes, if they could spare the time to speak with me.

Q And then what would you say next after that?

A Well, I would see if they had the time. And, as I said, only two of them expressed they did not have time that spoke with me. Then I would start in and tell them that basically—ask them—if it was obvious that they were in the late 30's or early 40's, I'd ask the age. Or if a woman was there, rather than asking the age, because a lot of people do not like to give their age, I would say, "Obviously, you're under 40." And she would either correct me or let it pass as under 40. But then I'd ask the head of household's occupation, and it was obvious it was a male or female.

Then there was a short sentence which I would read to them. That was: "Do you feel that the following activity depicted or described in a book, film, magazine or other printed material would go beyond your contemporary community standards?"

Q "... beyond your contemporary community standards?"

A I believe so, yes, sir.

Q And then would you hand them a survey after that or would you say anything more first?

A No, sir. I would—at no time did the person I was talking with have the survey. I have a clipboard. It was on the clipboard. They would stand next to me as I asked the questions. Then I would read the questions to them and receive their answers and mark it in their presence.

Q And so then you'd go down the line and ask them the questions after this sentence that you've indicated?

A Yes, sir.

Q Is that right?

A Yes, sir.

Q And after you completed that task, did you have anything further to say with the individual in each case?

A In the—I'm sorry, sir. I lost your—

Q Well, say, back with the people you talked to in San Diego—with this first person that you talked to, you then went down the clipboard list, asked the questions, marked off on your notes what their answers were; is that correct?

A Yes, sir.

Q Did you have anything to say to the person after that?

A No, sir. I would—that would terminate the survey. I would thank them very much for their cooperation and time.

Q Was this approach or procedure, speaking again in, perhaps, generalities, consistent throughout your whole tour?

A Yes, sir.

Q Did you at any time vary the approach that you took in this survey?

A No, sir. They were basically the same.

Q Now, I presume, you weren't physically present when these two other police officers conducted their part of this operation; is that correct?

A They were in my view most of the time but I was not standing with them, no, sir.

Q Would it be impossible for you to speculate on whether or not they conducted their approach in the same fashion as you did?

A Yes, sir, I believe they did.

Q Now, did you at any time show any of these people you were talking to any selected materials that might illustrate your points at all?

A No, sir.

Q Did you ask any of the people on your survey whether or not they had seen materials dealing with sex or nudity?

A You mean at the time of the questionnaire, sir, or anybody?

Q At the time of the questionnaire.

A No, sir.

Q Did you prepare this survey yourself?

A It was prepared alone with—

Q I asked you if you prepared it.

A I assisted in it, sir.

Q Who else was in on that?

A Sergeant Radesky and Officer Petroski and myself. We also had some other assistance.

Q Who was the fellow who made up the questions?

A Well, basically the questions, you might say, were taken from Sergeant Don Shaidell's eight-page questionnaire; but these were more generalized.

Q Did you retain the services of any opinion-sampling firm to aid you in setting up this approach?

A I'm sorry?

Q Did you retain the services of any opinion-sampling firm to help you in this effort?

A The only assistance that we had—

Q Well, please just answer the question, if you could, sir.

THE COURT: If the answer is not responsive, you will direct your appropriate motion to the Court.

MR. McDANIEL: I would move to strike that.

THE COURT: There hasn't been any answer yet.

THE WITNESS: I can't answer with a Yes or No, sir. It was assistance but I do not believe—in fact, I know the party is not involved in the marketing aspect or opinion polls now.

Q Who is?

A Mrs. Oretta Sears.

Q Isn't Mrs. Oretta Sears a district attorney in Orange County who specializes in prosecuting obscenity cases?

A At this time, yes, sir.

Q And she was working for the D.A.'s office down there when this whole thing started out; isn't that correct?

A Yes, sir, it is correct.

MR. IMHOFF: Objection, your Honor, as argumentative.

THE COURT: The objection will be overruled. The answer may stand.

BY MR. McDANIEL:

Q I take it, Officer Blackwell, that your aren't making a claim here that you're an expert on opinion sampling; is that correct?

A No, sir.

MR. IMHOFF: Object, your Honor. That doesn't go to qualifications—

MR. McDANIEL: I think it certainly does, your Honor. We're talking about a survey.

Let me make a preliminary question to that.

THE COURT: Are you withdrawing the question?

MR. McDANIEL: Well, yes. I'll get to it after a preliminary question.

THE COURT: All right. You may proceed.

BY MR. McDANIEL:

Q You've indicated to a question that was asked you by the prosecutor here that you have an opinion on the—what was it, just People's 1 that he asked you about so far? Yes, the magazine. You said you had an opinion on its candor and its appeal; is that right? You said you had that opinion?

A Yes, sir.

Q You base that opinion exclusively on what you found out in this tour, right?

A No, sir.

Q You don't base it on that at all?

A I do not use that totally as my opinion, yes, sir.

Q Does that fit into your opinion in any way at all?

A Yes, sir, it does.

Q What's the percentage of your opinion that's based on that survey?

MR. IMHOFF: Your Honor, I object to that. That's not proper on voir dire. It's—

MR. McDANIEL: Well, I think—

THE COURT: The objection is sustained.

BY MR. McDANIEL:

Q What are some of the other things that you use in forming this opinion?

MR. IMHOFF: I object to that again, your Honor; the same—

MR. McDANIEL: Your Honor, this is going to see if he is actually qualified to render these opinions.

THE COURT: Well, it would be material which would appear to attempt to attack the opinion itself which has not been given. The objection is sustained.

You may examine as to the expertise.

MR. McDANIEL: Thank you, your Honor.

BY MR. McDANIEL:

Q Now, do you use any other factors in your background as a police officer or otherwise in coming in here and offering your opinion as an opinion testifier?

MR. IMHOFF: Your Honor, I object again. This is a vague question and does not go to—

THE COURT: Sustained.

MR. McDANIEL: All right. I'll ask it this way.

BY MR. McDANIEL:

Q You have indicated you have this opinion. Do you base that opinion in part on your activities as a police officer engaged in obscenity investigations, arrests and prosecutions?

MR. IMHOFF: Object again, your Honor; does not go to qualifications.

THE COURT: Sustained.

MR. McDANIEL: May I approach the bench, your Honor?

THE COURT: You'll be given an opportunity to cross-examine this witness.

MR. McDANIEL: Well, I think this goes to see if he's qualified, your Honor.

THE COURT: Well, it doesn't go to qualifications. You may continue with your voir dire examination.
BY MR. McDANIEL:

Q Have you ever had any college courses in opinion sampling?

A No, sir, I have not.

Q Have you ever taken a degree in any subject at all?

A No, sir.

Q Now, you've worked in obscenity prosecutions and arrests, this field of police work, for some three years; is that right?

A Roughly, yes, sir.

Q You've never testified as a witness for the defense in any case, have you?

A Obscenity case?

Q Yes.

A No, sir.

MR. IMHOFF: Object, your Honor, as irrelevant.

THE COURT: The objection's overruled.

THE WITNESS: I believe I answered that, "No, sir."

BY MR. McDANIEL:

Q The answer was No, right?

A Yes, sir.

Q Did you ever familiarize yourself with any other opinion samples or surveys on the question of standards, besides this one that you took yourself with these two other officers?

A Yes, sir, I have.

Q Have you read The Report of the Presidential Commission on Obscenity and Pornography?

A Yes, sir, I have.

MR. IMHOFF: Object, your Honor, as irrelevant.

THE COURT: Overruled.

BY MR. McDANIEL:

Q Did you familiarize yourself with the results of the survey that was taken by that body?

A I have not familiarized—

MR. IMHOFF: Object, your Honor. This does not go to the witness' qualifications, attempting to ask him about a specific work which he has not stated he's used as a basis for his opinion.

MR. McDANIEL: I think counsel is assuming something here.

THE COURT: The objection will be overruled.

You may answer the question.

THE WITNESS: No, sir, I have not familiarized myself but I have read the Commission report.

BY MR. McDANIEL:

Q You're read the Commission report but you're not familiar with what their survey shows. Is that what you're telling me?

A That is correct, sir. I've read the book but I'm not—I don't know completely what it is.

Q Do you recall seeing anything in that work at all about a survey?

A Yes, sir. I did not use this to base any of my opinions on.

Q Could you explain to me why you don't use anything? Is it just because this survey is contrary to your own view?

MR. IMHOFF: Object to that, your Honor—

THE COURT: Sustained.

MR. IMHOFF: —as irrelevant and argumentative.

BY MR. McDANIEL:

Q Anyway, to get on with this, Officer Blackwell, what you're telling me is that the Presidential Commis-

sion Survey is something that you do not use in forming your opinions; is that right?

A That is correct, sir.

Q Do you use your knowledge of decisional law in the field of First Amendment rights and obscenity in any way to help you in forming your opinions here?

MR. IMHOFF: Your Honor, I object again. It does not go to qualifications.

MR. McDANIEL: Certainly does, your Honor.

THE COURT: The objection will be sustained.

BY MR. McDANIEL:

Q In coming up with your opinion, do you base your opinion in part on—

THE COURT: Excuse me just for a moment, Counsel.

Ladies and gentlemen, in order to fill the time created by the fact that we couldn't proceed with this case yesterday, the Court took another jury trial. And the jury which is now deliberating in the jury room has asked that certain matters be reread to them. It will be necessary for the reporter to find the subject matter they're interested in. And I would like to have that jury conclude its business so that there will be some place for you to deliberate in.

As a consequence, we're going to have to take a recess at this time so that the reporter will be able to find the subject matter that they're interested in and have it reread to them.

You'll be excused at this time. And as soon as we conclude that business we'll resume this matter. In the interim, you're again admonished that you're not to discuss this matter among yourselves nor with anyone else, nor are you to form or express any opinion thereon until the matter is ultimately submitted to you.

(There was held a recess.)

THE COURT: The case of People versus Murray Kaplan.

The record will show the defendant is represented by counsel, the People are present and represented, the jurors are all seated in their respective places in the jury panel box.

You may resume your voir dire examination of the witness.

MR. McDANIEL: Thank you, your Honor.

May I ask that the court reporter read back the last question and answer so I can keep my place here?

THE COURT: Very well.

(The testimony was read by the reporter.)

HUBERT E. BLACKWELL,

resuming the stand as a witness by and on behalf of the People, having been previously duly sworn, was examined and testified further as follows:

VOIR DIRE EXAMINATION (RESUMED)

BY MR. McDANIEL:

Q Officer Blackwell, in stating here that you have an opinion on the two questions put to you by the prosecutor, do you base that opinion on any other factors besides what you did on your survey activity?

MR. IMHOFF: Your Honor, object as irrelevant. No opinion has yet been given by the witness.

THE COURT: Objection sustained.

MR. McDANIEL: May I argue that point, your Honor?

THE COURT: There's no need to argue. The purpose of the voir dire examination is to ascertain the nature and extent of the expertise. The thrust of your

question goes to the validity or lack thereof of that opinion that hasn't been given. You're going to be given an opportunity to cross-examine this witness.

MR. McDANIEL: I understand that. Let me phrase the question this way.

BY MR. McDANIEL:

Q In offering to give this opinion, you are claiming a certain amount of expertise in this area, is that correct, Officer?

A Yes, sir.

Q That expertise, in your judgment, is based on this survey plus other factors?

A Yes, sir, that is correct.

Q What are the other factors that this expertise is based on?

MR. IMHOFF: I object as being vague.

THE COURT: Overruled.

You may answer.

THE WITNESS: Other opinion, public opinion polls, such as the George Gallup Poll, the Lou Harris Poll, the San Francisco Examiner Poll, Sergeant Shaidell's Poll, other law enforcement agencies, my contacts with the people, with the mass media, and the volume of complaints that have been received through our office.

BY MR. McDANIEL:

Q Okay. Then in part it's based on some other polls but not on the Presidential Poll, right?

MR. IMHOFF: Your Honor, I object as irrelevant. There has been no opinion given by the witness.

MR. McDANIEL: Well, we're saying what his expertise is based on.

THE COURT: The objection is sustained.

BY MR. McDANIEL:

Q Now, you say part of your expertise is based on handling complaints by people, correct?

A Yes, sir.

Q These are people who, what, see material which they don't like, contact the police department, and then you hear about the call or you talk to them; is that right?

MR. IMHOFF: Your Honor, I object to that question as not going to qualifications.

THE COURT: Overruled.

MR. IMHOFF: Beyond the scope of the direct.

THE WITNESS: It's partially that, yes, sir.

BY MR. McDANIEL:

Q Now, you wouldn't presume to classify these complainants as people who are objective and unbiased in this field, correct?

MR. IMHOFF: Object again, your Honor; does not go to qualifications.

THE COURT: Overruled—I mean sustained.

BY MR. McDANIEL:

Q Is it fair, then, to say, Officer Blackwell, that you don't base this claim to expertise on anything that you may have learned in college classes or any place?

A That is correct.

Q And you don't base it on any expert knowledge of psychology or psychiatry; is that correct?

MR. IMHOFF: Object, your Honor. The defense counsel is not asking questions about specific qualifications of the witness. These are irrelevant, do not go to his qualifications.

MR. McDANIEL: We're trying to see if he is qualified to render expert opinion, your Honor. I don't believe he is or I wouldn't ask these questions.

THE COURT: Would you read the last question, please, Miss Reporter?

(The question was read by the reporter.)

THE COURT: Objection will be sustained.

BY MR. McDANIEL:

Q You then base your claim of expertise solely on activities that you've undertaken as a police officer engaged in obscenity prosecutions and investigations; is that right?

MR. IMHOFF: Object, your Honor; asked and answered; improper question on voir dire.

THE COURT: The objection will be sustained.

BY MR. McDANIEL:

Q In stating that you have expertise in the area of prurient appeal, are you asserting that you have expert knowledge of human behavior in any sense?

MR. IMHOFF: Object, your Honor. It does not go to qualifications.

MR. McDANIEL: Certainly does.

THE COURT: Sustained.

BY MR. McDANIEL:

Q Do you have any expert knowledge of human behavior in the sexual area of life?

MR. IMHOFF: Object, your Honor. It calls for a conclusion.

MR. McDANIEL: Your Honor, he's offering himself as an expert.

THE COURT: Sustained.

MR. McDANIEL: I think we can find out if he is or not.

MR. IMHOFF: Your Honor, I would object to counsel's arguing these objections in the presence of the jury.

THE COURT: That objection is sustained.

Counsel has been admonished in this regard. The ruling will stand.

BY MR. McDANIEL:

Q Do you have any knowledge of abnormal psychology?

A In what respect, sir?

Q In any respect at all.

A You mean homosexuality or—

MR. IMHOFF: I object as being vague.

THE COURT: The objection is sustained.

You may rephrase your question.

MR. McDANIEL: All right.

BY MR. McDANIEL:

Q Do you have any basis in your training and background for expert knowledge in the area of human sexual behavior?

A As far as degrees or anything like this, no, sir.

Q Everything that you know in this area is things that you've learned as a police officer in the field of obscenity; is that correct?

A Yes, sir.

Q You're offering your purported expert testimony in the area of prurient appeal of materials to people. What is your definition of what a prurient interest in sex, nudity or excretion means?

A A shameful or morbid interest in sex, nudity or excretion.

Q And did you pick up that statement from the Penal Code definition?

A Yes, sir.

Q Have you based your claimed expertise here to any degree at all on knowledge of case law in obscenity?

A No, sir.

Q You have testified, however, that you are familiar with case law in obscenity is that correct?

A Generally familiar, sir, with the major decisions.

Q Do court decisions on specific items enter into your determination of your expert opinions?

MR. IMHOFF: Object, your Honor. Again, no opinion has been given.

MR. McDANIEL: He's offering his opinion.

THE COURT: Objection will be sustained.

MR. IMHOFF: That's irrelevant.

BY MR. McDANIEL:

Q Well, to take this from another angle, sir, is it fair to say, then, that you do not offer your proffered or professed expert opinion based on knowledge of decisional law and specific materials at all; is that correct?

MR. IMHOFF: Object again, your Honor; same grounds.

THE COURT: The objection is sustained.

Are you familiar with specific publications, films—magazines, films or books that have been the subject matter of litigation within the State of California that have been determined to have been obscene or not obscene by the courts?

THE WITNESS: I might be vaguely familiar with some of them, sir. I do not base this solely on my opinion.

BY MR. McDANIEL:

Q You don't base this solely on your opinion?

A Well, I don't base the court decisions on my opinion, sir, in all due respect to the courts. My job is to see if it goes beyond the contemporary community standards and if it appeals to a prurient interest. In all respect to the courts, I do not enter this in my opinion.

Q Where a court has specifically stated that material is, for instance, within customary limits of candor, does that aid you in forming your opinion at all?

MR. IMHOFF: Object, your Honor, as—

THE COURT: Sustained.

BY MR. McDANIEL:

Q Now, in talking about this question of whether an item appeals to prurient interest, and forgetting this other standards part of it for the moment, do you base your testimony on this prurient interest aspect exclusively on what you learned by this survey activity that you worked on?

MR. IMHOFF: Object, your Honor, as improper voir dire. No opinion has been given. It's a proper subject of cross-examination.

MR. McDANIEL: Your Honor, this is to see if he is an expert in the field.

THE COURT: The objection is sustained.

BY MR. McDANIEL:

Q Do you base your claimed expertise on the question of prurient interest exclusively on this survey that you've talked about?

MR. IMHOFF: Object, your Honor. It's been asked and answered.

THE COURT: Sustained.

BY MR. McDANIEL:

Q What percentage of the people that you talked to in this survey reside in the Los Angeles County area?

A It would have to be approximately 1/20th.

Q That's 1/20th of the 600 people that you talked to?

A Yes, sir.

Q Does that mean that you talked to 30 people in L.A. County?

A I surveyed 30 people in L.A. County, sir.

Q How many people did you survey in San Diego County?

A In San Diego I surveyed 30 people.

Q Now, how many different times did you do the interview in the supermarket during the whole survey time?

A I'm sorry. I don't follow you, sir.

Q Well, you testified that you, I believe, went to 20 cities, correct?

A Yes, sir.

Q In each of those cities, did you talk to 30 people?

A Surveyed 30 people, yes.

Q Right. What was the city in Los Angeles County where this took place.

A Los Angeles, sir.

Q And was it San Diego in San Diego County?

A Yes, sir, it was.

Q Did you also talk to 30 people in the City of San Francisco?

A Yes, sir.

Q Did you visit any other city in the Bay Area besides San Francisco?

A Yes, sir, Oakland.

Q And did you talk to 30 people in Oakland?

A Yes, sir.

Q Did you visit any other cities in the Los Angeles County or L.A. Basin Area besides the City of L.A.?

A Not in Los Angeles County, no, sir.

Q Did you talk to any group of 30 people in Orange County?

A Yes, sir.

Q What city?

A Santa Ana.

Q In conducting this survey, did you also go to newsstands, bookstores, theatres and arcades to determine what material was being sold in these areas?

A Yes, sir, I did.

Q However, you don't rely on your knowledge of what is being sold throughout the State to base these opinions in any way; is that correct?

MR. IMHOFF: Object, your Honor. No opinion has been given; improper question.

THE COURT: Would you read the question?

(The question was read by the reporter.)

THE COURT: The objection is sustained.

You may rephrase your question.

MR. McDANIEL: All right.

BY MR. McDANIEL:

Q In purporting to have expert knowledge of contemporary standards, do you base that claim in any way on your knowledge of what degree of graphicness exists in material being openly sold throughout this State?

MR. IMHOFF: Object again, your Honor; same grounds.

THE COURT: Overruled.

THE WITNESS: I'm sorry. I forgot the question now.

THE COURT: Have you referred to any survey or have you personally made any survey of the stores that sell magazines, films and books—did you perform any such study or refer to any such study?

THE WITNESS: Yes. We have visited these locations. As far as speaking with some of the people inside of the locations, yes, and sometimes the proprietors in bookstores and theatres, yes—they were not surveyed, no, sir, if that was the question.

BY MR. McDANIEL:

Q Well, do you use any part of that background knowledge in forming your opinion, sir?

A To a certain degree, sir.

Q Now, going to this question of prurient interest which—you've professed to have expertise in that area. Do you base your professed expertise in offering an opinion here on prurient interest exclusively on your survey activity which you previously testified to here?

MR. IMHOFF: Object, your Honor. It's been asked and answered.

MR. McDANIEL: I don't think it has.

MR. IMHOFF: Improper on voir dire.

THE COURT: Sustained.

BY MR. McDANIEL:

Q Is there any other facet of your experience or background which you utilize as a basis for your claimed expertise in the area of prurient interest, other than the survey that you took?

MR. IMHOFF: Object, your Honor. It's been asked and answered. It's vague, does not go to specific qualifications.

THE COURT: It is unduly repetitious. The objection will be sustained.

Have you any other factors in your background and experience that you haven't yet informed us of?

THE WITNESS: No, sir; everything that I've informed you of.

BY MR. McDANIEL:

Q And was your survey questionnaire a one-page form?

A Yes, sir, it was.

Q It had 11 questions on it?

A Yes.

Q Now, your survey itself—I believe you testified

already that you didn't ask or take down notes on answers on any of the questions but the 11 that are on your survey form, is that right, in the survey?

A That is correct, sir.

Q So, in other words, you did not ask any questions regarding prurient appeal on this survey at all; is that correct?

A Usually the people volunteered, but I did not ask any specific—no, sir.

Q Just to clarify this, Officer Blackwell, you didn't ask any questions about prurience on this survey.

What do you base your claim of expertise on prurience on, what factors?

MR. McDANIEL: And, your Honor, I'd like to approach the bench, if there's an objection to this question.

THE COURT: Very well. You may approach the bench.

(The following proceedings were held at the bench:)

MR. McDANIEL: Your Honor, this witness has indicated that he has an opinion on prurience. However, there is absolutely nothing at all in the survey activity which relates to prurience, and there's nothing at all in his qualification testimony which refers to prurience. I would submit that before I even argue whether he's qualified on the other point he is absolutely unqualified in the area of prurience. He doesn't show any type of special training or knowledge beyond that of the ordinary person which is that type of information required by the Evidence Code for a person to testify as an expert witness on a point.

And I would submit at this point that he is not qualified to render an opinion on prurience.

THE COURT: You've asked him his definition. He's given you his definition. The thrust of your objection goes to the weight, not to the admissibility.

MR. McDANIEL: Well, I think it goes further. Let me explain why just briefly.

The Evidence Code specifically states that, for a person to testify as an expert witness giving expert opinion, he must base that on information, knowledge or learning which puts him in a category beyond the average ordinary person. He has not shown such expert knowledge that puts him beyond the category of the ordinary person in terms of that question at all.

MR. IMHOFF: May I speak?

THE COURT: Surely.

MR. IMHOFF: I believe the witness has testified on direct examination, in answer to a question, knowing what appeals to a prurient interest. He was asked that question specifically, and he gave an answer, answers that relate to his many years as a vice officer working in obscenity.

THE COURT: Yes. The Court heard his responses.

MR. IMHOFF: I don't want to reiterate the whole thing, but certainly he has given evidence on a prurient appeal aspect, and he certainly is in a position that makes him more qualified than the ordinary layman because of his background and experience over the years in dealing with the subject matter in this area. He's certainly more qualified than the average layman to give an opinion in this respect.

MR. McDANIEL: Well, I don't think that a person that is a police officer—because of that, knows more. He's obviously got a point of view because he's a cop. That's not the point at all. I would think it

would be fair for me to ask him—he's claiming to be an expert in this area. I don't see why I can't ask him what he bases that on, that claim of expertise, because

THE COURT: The thrust of the questions to which the Court has sustained objections is cross-examination and not—and elicitation of experience.

Now, you established that he has no training in psychiatry and psychology and he has no degrees. All right. Well, the Court is ruling that the thrust of your objection goes to the weight and not to the admissibility of this witness' testimony. And the objection to the previous question is sustained.

MR. McDANIEL: All right. I just have a few more questions and then I will be through.

THE COURT: Very well. It's now 12:00 o'clock. It's four after 12:00. We'll recess at this point.

(The following proceedings were held in open court:)

THE COURT: Ladies and gentlemen, we're going to have our lunch recess at this time. You're admonished that you're not to discuss this matter among yourselves nor with anyone else, nor are you to form or express any opinion thereon until the matter is ultimately submitted to you.

Court will be in recess. You're ordered to report back to this courtroom at 1:30 p.m. without further order, notice or subpoena.

All parties and witnesses in the case of People versus Murray Kaplan are excused and ordered to report back at 1:30 p.m. without further order, notice or subpoena.

(Noon recess.)

LOS ANGELES, CALIFORNIA,
FRIDAY, JANUARY 22, 1971, 1:30 P.M.

THE COURT: Case of People versus Murray Kaplan.

The record will show defendant's represented by counsel, the People are present and represented, the jurors are all seated in their respective places in the jury panel box.

You may resume your voir dire examination, Mr. McDaniel.

MR. McDANIEL: Thank you, your Honor.

HUBERT E. BLACKWELL,

resuming the stand as a witness by and on behalf of the People, having been previously duly sworn, was examined and testified further as follows:

VOIR DIRE EXAMINATION (RESUMED)

BY MR. McDANIEL:

Q Now, Officer Blackwell, in compiling your survey activity here, did you make any attempt to compile it on a pro rata population distribution basis in the State?

A I'm sorry. I did not understand what "pro rata" means.

Q I'll phrase it in a different fashion.

Did you make any effort to give added weight to the responses that you received, for instance, from the 30 people in Los Angeles County on the basis that some 7½ million members of the State's 20-some-odd-million population reside there, as opposed, for instance, to the 30 people whom you talked to in Oakland which has a population of approximately 375,000?

A No. It was actually about equal, no added weight.

Q So in compiling it, what you did is you took the 30 people that you gave the questions to in each of the 20 cities, the 30 people that the other two officers who were with you on this operation talked to, and you added up the total of those people. And your breakdown is based just on that unweighted group; is that correct?

A Yes, sir.

Q And you did not attempt in any fashion to achieve a true random sampling technique in this survey; is that correct?

A No, sir, that is incorrect.

Q Did you try to make it a true random sampling technique?

A Yes, sir, I did.

Q Did you go to statisticians to determine how you could do this?

A Prior to going, we spoke with Oretta Sears who had past experience in the marketing opinion polls.

Q You spoke to Mrs. Sears. This is the deputy D.A. down in Orange County; is that right?

A Yes, sir, it is.

Q And what did you ask her in that regard?

A Basically, what we could do to make an authentic poll, a good poll. This is the reason supermarkets were chosen rather than churches or adult bookstores.

Q And you didn't make any attempt to include people in your survey that had had exposure to any adult-type material; is that correct?

MR. IMHOFF: Object, your Honor. That assumes a fact not in evidence and does not go to qualifications.

THE COURT: Overruled.

You may answer the question.

THE WITNESS: We did not survey in the bookstores. I spoke with people that were in bookstores. We were in these type of entertainment places, the bottomless bars, and so forth. But they were not surveyed because of the feeling that these people also have to purchase groceries at a supermarket.

MR. McDANIEL: Well, your Honor, that really wasn't responsive to the question. I'd move to strike that.

THE COURT: Motion to strike is denied.

In your survey where you spoke to people, did you run across individuals who had been to adult bookstores, had been to bottomless bars, had seen films?

THE WITNESS: Yes, sir, I did.

BY MR. McDANIEL:

Q Was that an extremely small percentage?

A That had seen it? No. I don't know what percentage breakdown it would be, but I don't think you could say it's on—a small percentage.

Q Was it over 50 per cent of the people?

A As I say, I have no way of telling.

Q Because you didn't take that information down, right?

A Right. We did have a question pertaining if they patronized the location, or this type of location that would have this type of entertainment.

Q And the group who indicated that they had was extremely small; isn't that correct?

A Yes, sir.

Q Did you at any time during this tour attempt to show any of the people that you spoke to the material that is involved in this case, People's 1, 2 or 3?

MR. IMHOFF: Object, your Honor. This has been asked and answered.

MR. McDANIEL: I don't think it has been at all. In fact, I know it hasn't been.

THE COURT: Counsel—

The jury is admonished to disregard voluntary statements of counsel.

Counsel, you're admonished in the future to make comments such as that outside the purview of the jury.

MR. McDANIEL: I apologize, your Honor.

THE COURT: Would you read the question.

(The question was read by the reporter.)

THE COURT: These particular items?

MR. McDANIEL: Yes.

THE COURT: The objection is overruled.

You may answer.

THE WITNESS: No, sir.

BY MR. McDANIEL:

Q In conducting your questions on this survey operation, did you ever ask any questions about what these people felt the customary limits of candor for the State of California were?

A I'm sorry. Would you read that back or—

Q I'll just ask it again.

In conducting this tour of the State with your two other officers, did you at any time make any attempt at all to ask any of the people what their views of what the customary limits of candor in this State are?

A No, not in that respect.

Q Thank you.

Now, did you during this tour ask anybody at any time whether any types of materials that you may have described to them went substantially beyond the customary limits of candor in the State of California?

A Without using the word "candor," yes, sir.

Q You did ask if something went substantially beyond their customary limits?

A Asked if it went beyond their contemporary standards and openness and frankness also, sir.

Q Well, in other words, then you did not use the phrase, Does it go substantially beyond, is what I'm getting at.

A That is correct, sir.

Q You did not; is that right?

A That is correct.

Q The only question you asked was would it go beyond the contemporary standards of their particular community in each case, correct?

A Go beyond their contemporary community standards of their community.

Q All right. Thank you.

MR. McDANIEL: Your Honor, I would submit, by way of an objection to this testimony, that this witness is not qualified to render these opinions at all because he does not have the proper qualifications.

MR. IMHOFF: Your Honor, object to this in front of the jury.

THE COURT: Very well. It's just been a generic objection.

The objection's overruled.

You may resume your direct examination, Mr. Imhoff.

MR. IMHOFF: Thank you.

DIRECT EXAMINATION (RESUMED)

BY MR. IMHOFF:

Q With regard to your survey, Officer, you testified that you, I believe, interviewed 30 people in each city?

A Yes, sir.

Q Those are the ones you personally interviewed?

A That were surveyed, yes, sir.

Q Were those the only 30 people surveyed in each city?

A Yes, sir.

Q Did your fellow officers survey any other people in each community?

A Yes, they did.

MR. McDANIEL: Objection. That would be hearsay, your Honor.

THE COURT: Overruled.

BY MR. IMHOFF:

Q What would be the total number of people surveyed in each city?

A Total amount of people in each city was 90.

Q Counsel asked you about the first question that you asked each individual on the survey.

MR. IMHOFF: May I approach the witness, your Honor?

THE COURT: You may approach the witness. Counsel, have you seen this document?

MR. IMHOFF: I'm sorry.

MR. McDANIEL: Yes, I've seen it.

BY MR. IMHOFF:

Q Now, when you asked that question of each person—the questions on your questionnaire, did you read the question to them?

A Yes, sir, I did.

Q Would you examine that document, please? Do you recognize that document?

A Yes, sir, This is a copy of the survey.

Q Calling your attention to the first question at the top of the survey, is that the question that you asked each individual?

MR. McDANIEL: That's been asked and answered, your Honor.

THE COURT: The objection's overruled.
You may proceed.

THE WITNESS: Yes, it is.

BY MR. IMHOFF:

Q Do you recall verbatim from your own memory the word-for-word questions on the survey?

A Yes. We would read it at the time, read it to the people and ask them the—

Q At this time do you recall verbatim, word for word, each question, from memory?

A No, without reading it.

Q Would read to the Court the first question on your survey.

A "Do you feel that the following activities depicted"—

MR. McDANIEL: Well, your Honor, I'd object to that. This document is here, and he says that's what it is. Then the best evidence rule would compel that the document be used rather than the testimony.

THE COURT: Do you wish to have the—

May I see counsel at the bench.

(The following proceedings were held at the bench:)

THE COURT: Are you seeking to have the compilation of the survey brought into evidence?

MR. IMHOFF: No. My only purpose in having him read this question is when he was asked on voir dire—his answer to a question was that he asked the people whether it went beyond their standards. And the actual question is not worded that way. I just wanted to get the correct wording of the question.

MR. McDANIEL: Let me respond to that, your Honor, because that's an important point. Counsel misleads the judge, because the question I asked was spe-

cifically: Did you ask whether the materials which you had specified went beyond the standards of their community.

THE COURT: The standards of the community, that's correct. And his response, as I recall, was: I substantially asked that question but I didn't use the term "candor."

MR. McDANIEL: In the question that was asked

THE COURT: That was the answer, as I recall. I really don't see the probative value of the question—

What is the thrust of this line of—what are you attempting to get at?

MR. IMHOFF: Just the correct wording of the question that he asked each individual, the first question.

THE COURT: You want them to know what the questions on the survey were?

MR. IMHOFF: Not all of them, just this particular one.

THE COURT: It might come in within the framework of rehabilitation. All right. The objection will be overruled.

You may ask the question.

(The following proceedings were held in open court:)

BY MR. IMHOFF:

Q Officer, would you just read the first question at the top.

MR. McDANIEL: Again, I'd object, your Honor, on the basis that if that is to be done then the best evidence rule would require that the document is present in court—

THE COURT: The objection is overruled.

You may read the question.

THE WITNESS: "Do you feel that the following activities depicted in a film, magazine, book or other printed material would go beyond the contemporary standards of your community?"

BY MR. IMHOFF:

Q Thank you.

Earlier, Officer, I showed you People's 1. Do you recall the question that I asked you in regard to People's 1?

A Would you repeat it, please?

Q Based upon your experience, training and research, do you have an opinion as to whether the material taken as a whole has a predominant appeal to the average person, applying contemporary standards, to a prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion?

A I do.

Q And based upon your experience, training and research, do you have an opinion as to whether the matter taken as a whole goes substantially beyond the customary limits of candor in depiction or representation of such matters?

A Yes, sir, I do.

Q What is your opinion?

MR. McDANIEL: I object to the opinion testimony on either of those on the basis that he's unqualified to give that testimony, your Honor.

THE COURT: The objection will be overruled.

You may answer.

THE WITNESS: In my opinion, this magazine taken as a whole, applying contemporary community standards to the average person, appeals to a prurient interest, a shameful or morbid interest in sex, nudity

or excretion. Also taken as a whole, the magazine goes substantially beyond the customary limits of candor in depiction or representation.

BY MR. IMHOFF:

Q Thank you.

MR. IMHOFF: May I approach the witness again, your Honor?

THE COURT: You may approach the witness.

BY MR. IMHOFF:

Q Officer, I show you People's 2, a book entitled Suite 69. Have you read this book?

A Yes, sir, I have.

Q And when did you read this book?

A It was over the weekend. I believe it was on the 16th or 17th—on the 16th.

Q Based upon your experience—well, assume the following facts: That this book entitled Suite 69 was sold on May 14, 1969, in a bookstore at 8818 West Pico Boulevard in Los Angeles to an adult.

Based upon your experience, training and research, do you have an opinion as to whether the material taken as a whole has a predominant appeal to the average person, applying contemporary standards, to a prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion?

A Yes, sir, I do.

Q Based upon your experience, training and research, do you have an opinion as to whether the matter taken as a whole goes substantially beyond customary limits of candor in depiction or representation of such matter?

A Yes, sir, I do.

Q And what is your opinion?

MR. McDANIEL: Your Honor, I have another

objection to that question where it's to the printed word in this book form, and I'd like to express that objection perhaps at length. I'm willing to do it here in front of the jury unless counsel objects because I think there's a specific distinction here that is different than in the magazine in question.

THE COURT: How long will the argumentation take?

MR. McDANIEL: About a minute and a half.

THE COURT: Would you approach the bench, gentlemen, with the reporter?

(The following proceedings were held at the bench):

MR. McDANIEL: Getting into this, I'm going to ask first of all that counsel stipulate that your Honor can look at this copy of the questionnaire.

Is that so stipulated?

MR. IMHOFF: Certainly.

MR. McDANIEL: I direct your attention, your Honor, to the form of the questions in this survey, and specifically this question and the breakdowns 1 through 5, since the other part is apparently related to live conduct problems.

As you look here, you see that what the questions that were asked are material depicted, and it's broken down into five subcategories—well, four subcategories and then this general question 5, "Would you patronize the stores?"

So going just to the four that are on this, you see that, first of all, the terminology is "depicted." Then you see what each question refers to is some form of nudity. Now, quite obviously, that doesn't refer to the printed word. And so his testimony based on this survey would quite clearly be beyond the scope of

whether the survey activity, if indeed it qualifies him for anything, would be on the printed word, since we're talking about nudity here and "depicted," which is different than "written, described," so that the question asked here is based on nothing that he's qualified on regarding this printed book.

MR. IMHOFF: Material can be depicted in words, your Honor. It doesn't have to be depicted in a picture or photograph. I believe in his first question he includes the reference to "book, magazine, film." Certainly, we have—

THE COURT: The objection is overruled.

You may proceed.

(The following proceedings were held in open court:)

BY MR. IMHOFF:

Q Again, Officer, what is your opinion?

A In my opinion, the book taken as a whole, applying contemporary community standards to the average person, appeals to a prurient interest, a shameful or morbid interest in sex, nudity or excretion. Also, the book taken as a whole goes substantially beyond the customary limits of candor in description, representation.

MR. IMHOFF: May I approach the witness again, your Honor?

THE COURT: You may approach the witness.

BY MR. IMHOFF:

Q Officer, I show you People's 3 and 4, a photograph and film entitled Ann and Don. Did you view the film entitled Ann and Don?

THE COURT: What was the name?

MR. IMHOFF: Tammy and Danny. I'm sorry.

THE WITNESS: Yes, I did.

BY MR. IMHOFF:

Q When did you view that film?

A Monday the 18th.

Q Assume that the film, along with the picture, was sold on May 15, 1969, in the City of Los Angeles at a bookstore at 8818 West Pico Boulevard to an adult.

Based upon your experience, training and research, to you have an opinion as to whether the material taken as a whole has a predominant appeal to the average person, applying contemporary community standards, to a prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion?

A Yes, sir, I do.

Q And based upon your experience, training and research, do you have an opinion as to whether the matter taken as a whole goes substantially beyond customary limits of candor in depiction or representation of such matter?

A Yes, sir, I do.

Q And what is your opinion?

MR. McDANIEL: I'd object; same grounds previously stated to these opinion answers.

THE COURT: The objection's overruled.

You may answer.

THE WITNESS: In my opinion, the film taken as a whole, applying contemporary community standards as to the average person appeals to a prurient interest, a shameful or morbid interest in sex, nudity or excretion, also taken as a whole, goes substantially beyond the customary limits of candor in description and representation.

BY MR. IMHOFF:

Q And on each of People's items, what are the reasons for your opinions as to each?

MR. McDANIEL: Objection, unless it's broken down.

THE COURT: All right. The objection will be sustained.

You may proceed.

MR. IMHOFF: Thank you.

BY MR. IMHOFF:

Q In regard to People's 1, the magazine entitled Yum-Yum, what are the reasons for your opinion?

A I base my opinion on the emphasis on the genitals that is placed in each picture, the focusing of the camera, the spread leg of the models, the fact that the magazine has no story line, the close proximity of the female's face to the male penis in numerous pictures, the proximity of the male's hands in the area of the female's vagina and the lower stomach and the inner thighs, the emphasis on the pubic area and the genitalia of both the male and the female.

On the book, Suite 69, this book has no—or is a very weak story line.

MR. McDANIEL: Your Honor, I would object to that and move to strike it. This witness has not been offered or qualified as a literary expert. Now he's giving us some kind of a course in literary criticism that's beyond the scope of his examination completely.

MR. IMHOFF: Your Honor, I'd object to counsel arguing these matters in front of the jury.

THE COURT: The objection of the defense will be sustained on the grounds that the answer is not responsive to any question posed.

Defense counsel again will be admonished not to present argument in the presence of the jury.

And the jury is admonished to disregard the suggestions of counsel made in objecting to the question.

You may proceed, Counsel.

BY MR. IMHOFF:

Q Officer, in regard to People's 2, the book entitled Suite 69, what are the reasons for the opinion you just gave?

A I base my opinion on the fact that this book has every conceivable sex act from normal intercourse to incest, sodomy, each act being very graphically described in street vernacular; the homosexual acts between males and between females very graphically described; the Lesbian activities, of course, very graphically described; the oral copulation, the acts of sodomy; anal intercourse is graphically described; the group sex parties or orgies; the voyeurism of the people watching these sex orgies, which again—each being very graphically described; the incest between the sisters; the flagellation or the spanking with the hairbrush of the sister; the bondage of tying the younger sister up spread-eagled in a bed; and the excretion which—again, all these acts being very graphically described; the excretion of urinating in the mouth and in the body—on the body of the younger sister.

The language used in this book appeals to a prurient interest, a shameful or morbid interest in sex, nudity or excretion. I feel, in my opinion, that this is a fantasy.

MR. McDANIEL: Your Honor, I will respectfully ask that you admonish the witness in that regard again that he's stepping beyond the bounds—

THE COURT: The objection will be sustained.

THE WITNESS: The book is one sexual episode after another, each being very graphically described.

MR. McDANIEL: Your Honor, I'll move to strike that as unduly repetitious of previously rendered testimony.

THE COURT: Sustained.

THE WITNESS: It is a conveyor of sex for sex sake.

MR. McDANIEL: Your Honor, I'll move to strike that again as being a piece of criticism not based on proper qualifications.

THE COURT: Overruled.

BY MR. IMHOFF:

Q Calling your attention to People's 3 and 4 on which you rendered an opinion, would you tell the Court the reasons for that opinion.

MR. McDANIEL: Your Honor, I believe that he was only asked for his opinion on the film. I don't think this other item was even gone into. It's improper to ask that question now.

THE COURT: The objection will be sustained.

You may inquire as to People's 3.

BY MR. IMHOFF:

Q In regard to People's 3, Officer, would you give us the reasons for your opinion.

A Yes. This picture, also the camera angle, the emphasis placed on the genitalia of the male and the female—

MR. McDANIEL: Excuse me, sir.

Your Honor, I must object again. This witness is testifying beyond his qualifications. He's getting into camera—I think it's improper.

THE COURT: Overruled.

You may answer.

THE WITNESS: The close proximity of the male's face to the breast of the female, the proximity of the male's hand to the female's pubic area on the thigh.

THE COURT: Wasn't People's 3 the film?

THE WITNESS: I believe they said 3 and 4, your Honor.

BY MR. IMHOFF:

Q I'm referring to the film, Officer. I believe that's People's—

MR. McDANIEL: Well, then I'll move to strike everything he said so far.

THE COURT: All right. The motion is granted.

The jury is admonished to disregard the testimony of this witness as to People's 3.

We're talking about the film, are we not? What number is that?

MR. IMHOFF: This is People's 3.

THE COURT: The reel of film was entered as People's 5.

MR. McDANIEL: Is that People's 5?

THE COURT: Let's see what my notes indicate.

Yes, People's 5 is the reel of film.

MR. IMHOFF: I'm sorry, your Honor.

THE COURT: All right. You may proceed.

MR. IMHOFF: Thank you.

BY MR. IMHOFF:

Q Officer, calling your attention to People's 5, is this the film that you viewed on the 18th?

A Yes, it is.

Q Is this the film you were referring to when I asked you about an opinion earlier?

A I was referring to the picture whenever I was giving my opinion.

Q Strike that.

When I asked you the questions whether you had an opinion and as to what the opinion was, and I asked you if you had seen the film, I believe I referred to it as People's 4 at that time.

A Yes, sir. This is the film that I had in mind, yes.

Q Was People's 5 the actual film that you saw and had in mind when you answered that question?

A Yes, sir, it is.

Q Would you give us the reasons for your opinion that you had given us on People's 5.

A Yes, sir; the licking of the breast by the male of the female, the emphasis once again on the genitalia or the pubic area of the female as she would spread her legs, the see-through clothing or pants, being able to see the pubic hair through the pants, the licking of the leg by the male, the proximity of the female's hands to the male's genitalia, the licking of the lower stomach and of the back area by the male, and where the male's head goes out of the picture and the camera then focuses on the female's facial expressions simulating—

MR. McDANIEL: Your Honor, I'll object to this type of speculative testimony and ask that the witness be admonished.

THE COURT: Overruled.

You may continue.

THE WITNESS: —simulating that possibly an act of cunnilingus or oral copulation is being committed; the facial expressions by the female showing sexual arousal, the removing of the clothing by the male and the female; at this time, the fact that the camera zooms in on the vaginal orifice as she spreads her legs, causing the lips of the vagina to separate exposing the interior portion of the vagina.

Along with this opinion, I base my opinion on all three, the magazine, the book and the film, on the survey that I conducted where 99 per cent of the people felt that this type of depiction went beyond their community standards and appealed to a prurient interest.

I also base my opinion on the George Gallup Poll that was conducted in 1969 where 76 per cent of the

MR. McDANIEL: Well, your Honor, I'll object to that.

THE COURT: The objection is sustained, going beyond the scope of the question.

THE WITNESS: I base my opinion on the volume of complaints that have been received through our office, on my—

THE COURT: The question was merely what you saw in the film that caused you to arrive at your opinion.

THE WITNESS: Yes, sir. That would be it then.

THE COURT: Anything further?

MR. IMHOFF: No, nothing further at this time, your Honor.

THE COURT: You may cross-examine.

MR. McDANIEL: Thank you, your Honor.

May this be marked as Defendant's first?

THE COURT: Hasn't there been a Defendant's A?

MR. McDANIEL: Let me check the record here, your Honor. I'm not quite sure.

THE COURT: All right. It will be marked Defendant's A.

Would you describe the exhibit for the record.

MR. McDANIEL: Yes. This is a copy of Playboy Magazine, January 1971 issue.

Have you seen this, Counsel?

MR. IMHOFF: No, I haven't.

MR. McDANIEL: While he's observing it, I will have other items marked, your Honor, if that's okay.

THE COURT: Very well.

MR. IMHOFF: Your Honor, may we approach the bench?

THE COURT: Well, let's mark these for identification. Then I'll hear whatever argument you have to present as to these items.

MR. McDANIEL: I'd like to have these two marked next in order.

THE COURT: Perhaps we might do this out of the presence of the jury.

Ladies and gentlemen, we're going to have a recess to mark these exhibits and to hear any arguments with regard to the exhibits. You're excused at this time, and we will resume as soon as this business is transacted.

You're again admonished that you're not to discuss this matter among yourselves nor with anyone else, nor are you to form or express any opinion thereon until the matter is ultimately submitted to you.

(The jurors left the courtroom.)

THE COURT: All right. Is it all right if the witness steps down?

MR. McDANIEL: Yes, I have no objection. I'd like to perhaps inquire here as to the—

THE COURT: All right. The record will show that the jury has vacated the courtroom.

You may proceed.

MR. McDANIEL: Your Honor, I'd like to inquire as to what counsel's request to approach the bench is based on. I think we can probably do it now in open court since the jury's gone.

THE COURT: Very well. You may be heard.

MR. IMHOFF: Well, your Honor, before defense counsel attempts to parade this material in front of the jury, in front of the witness, I would like to have some kind of a hearing on this matter which could be

very prejudicial to the jury, to the People's case, could consume an undue amount of time and be—

THE COURT: Firstly, Counsel, have you seen the material that—

MR. IMHOFF: No, I have not.

THE COURT: All right. Well, I'll give you an opportunity to look over these materials.

Court will be in recess. Inform the Court as soon as you've examined the exhibits.

(There was held a recess.)

(The following proceedings were held in chambers:)

THE COURT: In the case of People versus Kaplan, the record will show that the following proceedings are being held in chambers.

MR. McDANIEL: Your Honor, let me point out at the outset now that, at this phase of the proceedings, what I am engaged in doing is cross-examining the People's alleged expert witness regarding the testimony he's given, with an eye toward impeaching his credibility by a variety of means, one of which is perhaps the specific reason that we're in chambers now, which includes examining him with regard to other periodicals, for a variety of reasons, each reason perhaps different in each of the exhibits. But it should be noted at this point that we're not really at the point right now of defense of the case and comparable exhibits in the sense of the defense of the case. They are comparable exhibits in the sense of interrogating the credibility of this witness and illustrating what I believe to be salient miscellaneous points in his testimony. And I have specific factors with regard to each of these publications. However, I feel that the prosecutor probably should address his objections, and then my answers in that in order.

And I would suggest that we then start off with Exhibit A which is the Playboy Magazine.

And with that brief summary—

THE COURT: Now, you want to ask him particular questions about these exhibits, A through P?

MR. McDANIEL: Yes.

THE COURT: To question his expertise?

MR. McDANIEL: Question his expertise and question the credibility of the statements that he has made in his sworn testimony here, because I think that it's improper, and I think that these exhibits will help illustrate that impropriety.

MR. IMHOFF: Your Honor, in a case such as this, the issues are often confusing enough, and it would be extremely prejudicial at this time for defense counsel to be able to cross-examine on any irrelevant material, any material that—and parade this material in front of the jury. It would be overwhelmingly prejudicial. It would consume a lot of time and confuse these issues on each and every item defense counsel wishes to either cross-examine on or offer into evidence, I think we should be entitled to some kind of a hearing on each and every one of these to determine its relevance.

THE COURT: All right. Now, the basic purpose of the officer's testimony was to elicit his opinion that the exhibits in question went beyond the customary limits of candor in the community and that they cater to a prurient interest.

Now, how will these exhibits serve any probative value in either proving or disproving or casting aspersions on his opinion?

MR. McDANIEL: All right. There's basically two things that I think, your Honor, need to be made aware

of now. One is this: I am interested in taking a deal of time such as this with these exhibits at this point not only really for the purpose of impeaching the witness, but I think also it can prove to be quite helpful to this Court in light of what you might anticipate is a 1118.1 motion at the close of the People's case. And I think that getting this material in at this point will help supply content to that.

THE COURT: Are you making an offer of proof that each of these has been found to be within the limits of candor, not catering to a prurient interest within the community?

MR. McDANIEL: I'd have to go down each one because that is true with regard to some of them, and there's other factors with regard to others.

First of all, if we just turn to Exhibit A which is the Playboy Magazine, my offer of proof on that is simply this: that, according to this officer's survey—and I'll get into probably great detail on this survey, greater detail than what the prosecution has gone into, in my cross-examination. His opinions, as he testified, are based, I think we could say, mainly on this survey activity and also on his experience as a police officer in vice control. I think those are the two bases that he utilized to develop his expertise.

With regard to the Playboy Magazine, that goes in to discredit a number of things that are in his survey and upon which he bases his opinion. One of those factors is that in his survey he comes up to the conclusion that even semi-nudity, not even full nudity, but even semi-nudity is beyond the standards of the community based on his survey. And the fact that Playboy Magazine's national circulation of over six million has not been prosecuted and today contains explicit nudity, in-

cluding the pubic area, would tend to discredit any weight that might come in from that survey, because it would show that those questions asked on that survey and what came out of that survey do not support a probative statement of expertise with an opinion from that that materials are beyond the standards because Playboy Magazine today with this huge circulation comes out with the things that are in Playboy Magazine now.

And there's two photo essays in there specifically, one called Act of Love and another one which is a Playmate review—your Honor will see that this material, under his survey, would be beyond the standards, and yet it's obvious, and an inescapable fact, that this magazine is part of our national standards and part of our state-wide standards. It's been around for a long time. It's over six million circulation. The circulation in California alone, I believe, is over two million. And it's just inescapable that he would have to say, if I asked him the questions about that magazine, that the photo essays in that magazine go beyond these standards. And I want to get that out of him because I think that discredits his testimony.

So that's basically the reason for the Playboy exhibit.

MR. IMHOFF: Your Honor, Playboy Magazine is not in issue here as to whether it's obscene or not obscene. You can't lift something out of context and—like one semi-nude thing in Playboy—and discredit the officer's testimony. The officer did not testify that semi-nudity goes beyond the customary limits of candor. He testified to this material as a whole based on all of his experience and the survey; that these particular items go substantially beyond the customary limits of candor. What counsel is trying to do here is to prove that this

may not go beyond the customary limits of candor; therefore, the other book may not go beyond the customary limits of candor because it may have semi-nudity in it. He's just taking everything out of context. It has no relevance to contemporary community standards. The magazine—the only possible relevance of anything that defense counsel might want to introduce would be in regard to contemporary community standards, standards in the community. And we're talking about a state-wide standard here. And he's trying, by going in the back door—to try and show that the standards are something else than what they are.

Just because something's available on the market doesn't mean that that's the customary—goes beyond or does not go beyond the customary limits of candor in the community.

MR. McDANIEL: Let me respond to those comments, your Honor.

Number one, counsel's objection would probably more properly go to the weight of this particular exhibit. However, the exhibit is offered at this point to point out, after some foundational questions which I intend to ask the officer which will bring out the factors about this survey that have not yet been brought out, that indeed the survey itself, because of the way it was conducted and the answers that were obtained, is meaningless. And I think that Playboy's mass circulation plus the explicit nudity helps to supply that contention with support.

It's also, I think, quite significant for your Honor to note that, where counsel here states that we're talking about, for instance, the exhibit charged taken as a whole and that that's what's involved, this survey didn't go into taking materials as a whole whatsoever.

It went into asking, Does X material depicted in a magazine, book or film go beyond your standards; so that, by virtue of the very questions that he asked in the survey which he used as the main focus for his alleged expertise—those are based on taking things out of context, by the way the questions were phrased.

And it's also important to know that he didn't use the exhibits charged here in the survey or any other illustrative materials to get these opinions. And it was just: If material is in something, does that go beyond your standards?

So his whole basis is on this taking things out of context.

MR. IMHOFF: Your Honor, the expert didn't base his opinion on one little question in the survey. Defense counsel's had the opportunity to voir dire the witness on the survey and to attack its meaning and its reliability. This could do nothing except be very prejudicial, to allow anything like this to come in at this time. I mean it has no relevance whatsoever.

THE COURT: As I understand it, your offer of proof is that you're offering to show items available, either on a state-wide or a nation-wide level or nation-wide including the state plus those on a state-wide level, to show what is available, which, you contend, will impeach this officer's survey or the basis upon which he makes his conclusion?

MR. McDANIEL: Yes. This is just with regard to Exhibit A that I'm making this offer of proof, the Playboy Magazine alone.

THE COURT: Well—

MR. McDANIEL: Let me show you the two specific sections of the magazine that I intend to question him on.

THE COURT: I suppose you want the centerfold, I would take it?

MR. McDANIEL: I wasn't going to use Miss January in this interrogation. I'll show you the two sections I was intending to use.

I might add that I find counsel's objection a little inconsistent where he says irrelevant and prejudicial. If it's irrelevant, I don't see how it could possibly be prejudicial. So I assume that his basic argument is that it hurts his case. And I don't think that's a valid objection for anything.

THE COURT: We don't have to engage in personalities, Mr. McDaniel.

MR. McDANIEL: I apologize for that.

The photo essay starting at page 155 entitled Act of Love goes over through page 159, and the photo essay entitled Playmate Review which starts on page 173 and goes over to page 181—those are the two that I am specifically interested in interrogating on.

MR. IMHOFF: Your Honor, the obscenity of this book is not in question, and those materials in themselves, taken by themselves, may be obscene and they may confront contemporary community standards. That proves nothing.

MR. McDANIEL: Of course, the way you prove a case is piece by piece. I think that I'm entitled to go into my approach to the case, you know, on a step-by-step level. You obviously can't do everything at the same time.

THE COURT: With regard to this Act of Love, it seems to be a purely photographic essay.

Is that correct?

MR. McDANIEL: Yes. There's no text to it.

THE COURT: There's little or no text.

MR. McDANIEL: I might add that at times in the past Playboy Magazine has been prosecuted for obscenity. It's always been found not obscene. None of those cases have ever taken place in the State of California, to my knowledge.

THE COURT: Now, the question that I'm grappling with—

Will you again restate your offer of proof as to how this is going to impeach the officer's expertise?

MR. McDANIEL: Yes, your Honor.

The officer's expertise—and I'm talking now about his basis for that which was most largely his survey activity, but also his other activities—this basis, according to him, gives him the knowledge that allows him to say that certain things go beyond these community limits of candor and certain things appeal to a prurient interest, specifically the publications in this case.

Now, what this Exhibit A, Playboy Magazine, tends to show is: It tends to impeach his viewpoint that these nude-type materials do indeed affront these contemporary standards. And to get into it, I have to go through foundational questions to the witness on what his survey disclosed that have not yet been gone into. What that survey tends to show is that any material, including mere semi-nudity with nothing more, goes beyond these customary limits of candor. And his testimony would be that it appeals to a prurient interest also, although it's important to know that his survey didn't ask questions about prurient interest.

THE COURT: Well, the fact that there is this material available, would that necessarily impeach the representations of those who made these disclosures to him and whose information he complied?

MR. McDANIEL: Yes, I think it would, for the following reason, your Honor: It would show that those representations lack cohesive validity because there was no attempt to illustrate the questions asked by showing any material to these people, including Playboy Magazine. Nothing at all was shown to them. And the fact that this is a mass-circulation magazine, as I say, over six million circulation—it may be up to eight million now—and at least two million in the State of California, with never any question about its legal status in this state raised about it, would, I think, quite clearly, tend to show by objective evidence that what he's talking about in this survey is misconstrued, misconceived and incompetent and, therefore, not to be considered.

And I would classify that as impeaching that testimony.

MR. IMHOFF: Your Honor, that section, taken by itself, may well confront the contemporary community standards, in that book. It may go substantially beyond what the customary limits of candor are, taken by itself, out of that book. But when you take the book as a whole it may have a lot of redeeming social value.

THE COURT: Well, the thing that is disturbing me—and maybe I can put it a little plainer.

The survey which you are seeking to impeach are representations made by the sample—I'm not ruling on the validity of the sample, whether it's a cross-section or what. But what he has testified to is that he has gone these various places, he's talked to the individuals that he has indicated; he has reviewed the representations made to other officers; and they have made these representations to him. And based upon a compilation of these representations made by third parties, he

has arrived at a conclusion as to what the customary limits of candor are.

Now, if you wish to impeach the survey itself, I don't know how picking items at random or picking items that may be on the shelves of our bookstores would impeach that survey itself. You may come up with—

MR. McDANIEL: It might impeach his testimony, though. In other words, it's not just the survey but the fact that he takes these things into consideration and then says that this is beyond the state-wide standards. And what I'm trying to get at is: I think this does two things. I think it does impeach the survey in one way, and I think it also impeaches his testimony based on that survey and these other factors; that these materials in this case affront these contemporary standards. I think that really is even more important than impeaching the survey. But I think that, in interrogating an alleged expert, you can interrogate and impeach the individual bases for his opinion as well as his overall opinion; and I submit that this one does both.

THE COURT: Well, I'm not prejudging the possibility that these items—if they are comparable or if there is some other theory upon which they can be received. I don't see how this in any way proves that the representations made to this officer and his fellow officers in the survey are not truthful. Maybe everybody that made a representation to him could be impeached, but I don't see how this does it.

So on the basis of impeaching the survey, your offer of proof will be rejected.

MR. McDANIEL: Well, let's go on to the basis of what's really at issue which is impeaching his testimony which he bases on that and other things. But his testi-

mony offered as an expert is that these materials in this case go substantially beyond these customary limits of candor in this state. And I think that this Exhibit A is instructive in impeaching that opinion testimony; that it does go substantially beyond it, so that that's—

THE COURT: And it's your claim that the Playboy representations are within the customary limits of candor?

MR. McDANIEL: Yes, that they, in fact, help show us something about what these customary limits really are; not everything. It's just one part of a whole series of things. And, as I say, it's a step-by-step approach that I'm taking.

THE COURT: Now, you're going to—is it your offer of proof that you will lay a foundation that that comes within the customary limits of candor?

MR. McDANIEL: Yes.

MR. IMHOFF: Well, your Honor, my position is that that isolated passage in there may not be beyond—may be well beyond the customary limits of candor, but you have to judge a publication as a whole as to whether it goes beyond the contemporary community standards and substantially exceeds the customary limits of candor. You can't take something isolated out of a book or some place and prove by that that that may not go beyond the customary limits of candor and therefore this book should not go beyond the customary limits of candor.

What he's trying to do here is say, well, Playboy is obscene or not obscene. And Playboy is not at issue in this case at all. It just confuses the issues completely in the case.

Mr. McDANIEL: I'm not trying to get him to testify on whether or not Playboy's obscene. I've explained

quite clearly what the purpose of this is. And I can lay a foundation through testimony by this witness about this Playboy Magazine. And I'm willing to excise from the magazine just the photographic essays alone and not have him look at the rest of the stuff, if that would seem to be a proper approach. I don't care either way.

THE COURT: Now, the thing that is disturbing me, so far as that offer of proof is concerned, is the question of comparability.

Supposing—let's, for purposes of argument, say this comes within the customary limits of candor. Supposing this depiction comes within the customary limits of candor. Maybe it's substantially or even very close to the line, and by reason of the fact of the lack of comparability—there's no actual showing of the genitalia, for one instance. There is some minor text. There isn't a substantial text in that one article.

MR. McDANIEL: Of course, there is the genitalia and pubic-hair areas depicted in the photograph.

THE COURT: No. There's the upper part of the pubic hair depicted. That's true. But there is no showing of the labium or—

MR. McDANIEL: No. That's correct.

THE COURT: —which could very well be a substantial and very important difference between the two.

MR. McDANIEL: Well, again, I think, your Honor, that that goes perhaps to the weight of the exhibit. But I think that it is instructive to—

THE COURT: I'm assuming that you're going to lay a foundation subsequently that this comes within the customary limits of candor, by some expert testimony.

MR. McDANIEL: Subsequently, yes.

THE COURT: And you now would want to ask this expert what in his opinion distinguishes this from

that and why, if he comes—supposing he comes to the conclusion this is obscene. Then there would be a conflict in issue as to whether Playboy is obscene or not.

MR. McDANIEL: Which would raise a serious cloud on his credibility.

THE COURT: Supposing he says it's not obscene?

MR. McDANIEL: I wouldn't probably ask him whether it's obscene, actually. I just intend to ask him specific questions about this photo essay, based on his previously proffered testimony in this case, which will tend to show that his testimony was wrong and impeach his credibility. That's all.

MR. IMHOFF: Your Honor, if he wants any comparative material, it seems to me it would have to be material that has—something in itself as a whole has been judged not to be obscene, that it compares to this particular material in this case. I mean, if I had a movie here of a young woman masturbating herself with—wearing sheer nightie or something, I suppose perhaps under those conditions counsel might bring in the movie in the Pinkus case which was practically the same thing, a movie of her masturbating herself by herself, that taken as a whole. I mean you're trying to compare apples and elephants here, I mean, to prove contemporary community standards by this method. This is not competent evidence to prove contemporary community standards.

THE COURT: Well, we're talking about impeachment of this witness' testimony. As I say, I'm not ruling on any offer of proof that these items might not be receivable as comparables or not. I haven't seen any such offer so I'm not going to rule on that. What we're talking about now is impeaching the testimony of this officer with the use of these items.

MR. McDANIEL: Specifically, at this point, just Exhibit A, because I have different points about the other exhibits, your Honor. If you'd care for me to go into those at this point, I'll be happy to do so.

THE COURT: Well, on the basis of impeachment, on the basis of the offer of proof made, I'm going to deny that offer as to Exhibit A.

All right. Now, Exhibit B.

MR. McDANIEL: Now, Exhibit B is two publications, Eager Beaver and Fluff. Those magazines will tend to impeach the credibility of this witness' testimony for the following reason:

Those are two of the four magazines which were found to be not obscene and within customary limits of candor by the Appellate Court here, the Appellate Department of the Superior Court in *People versus Bonanza Printing Company*, 76 Cal. Reporter 379. The official cite I have is 271 A.C.A. 726. I'm sure that's been supplanted by a C.A. 2d cite at this point which I don't have.

I would make the representation as an officer of this court that I was the counsel in that Bonanza case at the outset, and what actually happened was the case came on before a Municipal Court judge in a pretrial determination of whether or not the materials were obscene or not obscene in the constitutional sense. The judge ruled that the magazines were not obscene because there was no showing that they went substantially beyond customary limits of candor. That opinion was affirmed by the Appellate Department.

THE COURT: It's 871 and it's Appellate Department of the Superior Court, 271 Cal. App. 2d, 871, the back portion of this report, *People versus Bonanza Printing Company*.

It indicates that Judge Ackerman issued a search warrant, and this was an appeal of his denial to suppress same.

MR. McDANIEL: I might add just one quote from the Court's characterization of this material:

"Repulsive and disgusting as the material is, and much as it might appear to the layman as obscene, under the dictionary definition of that term it does not meet the constitutional rules for determination of obscenity."

THE COURT: Now, what is your offer of proof as to how you're going to use this to impeach? You're going to have him compare this with what he has found to be beyond the customary limits of candor. Is that correct?

MR. McDANIEL: Well, I'm not going to ask him to compare that with the material charged. What I am going to do is ask him a series of questions about how he would characterize this material based on his survey, and then I will show that his characterization of this material shows that his credibility is impeached because there's been specific finding by the courts that this material does not go beyond these customary limits of candor; and that will supply authenticity to the view that his credibility is impeached.

MR. IMHOFF: Your Honor,—

THE COURT: Yes.

MR. IMHOFF: —the material may, in the officer's opinion, based on his survey, go substantially beyond the customary limits of candor, go beyond the contemporary community standards, et cetera, and have nothing to do with his credibility because of—if an appellate court found something to be not obscene for one reason or another, it does not necessarily mean that

that particular thing does not go beyond the customary limits of candor, based on his experience and survey, and that it does not go beyond the contemporary community standards.

I would like to look at Bonanza again. I haven't read it for a long time.

THE COURT: All right.

(There was held a recess.)

(The following proceedings were held in open court:)

THE COURT: The case of People versus Murray Kaplan.

The record will show the defendant is represented by counsel, People are present and represented, the jurors are all seated in their respective places in the jury panel box.

Ladies and gentlemen of the jury, an unforeseen contingency has occurred with regard to your companion jury. They have requested that the entire testimony of the case be reread to them. However, they have indicated that if certain subject matter is—there may be—I can only speculate that perhaps some jurors have indicated that certain testimony was not given, and others said it was given. They've indicated that if they come to that particular portion that is in controversy, that will settle their problem; that we may not be required to read the total testimony. However, they have requested that the total testimony be reread.

We have also not concluded the very technical discussions that we're engaged in now which must be done outside the presence of the jury. As a consequence, to make sure that you're not discommoded Monday with the—because of the fact that we have the one reporter that must report both cases, this reporter will be re-

quired to be in chambers while we're conducting the business pertaining to this case, and this reporter will have to read the testimony to the other jury.

As a consequence, in order to avoid discommoding you and require you to hang around the whole morning, we're going to have to recess this case to Monday at 1:30 p.m.

Now, we're going to be parting company over the weekend, and therefore the Court's admonition will become more important because of the fact that evidence—a portion of the evidence that will be presented to you has been brought to your attention. As a consequence, I wish to again emphasize the fact that you're not to discuss this matter among yourselves nor with anyone else, nor are you to form or express any opinion thereon until the matter is ultimately submitted to you.

I again advise you that if someone persists in discussing the case after you've told them that I've ordered you not to discuss it, and they persist, you bring that to the Court's attention.

You're excused at this time and ordered to report back Monday, January 25, 1971, at 1:30 p.m. without further order, notice or subpoena.

(The jurors left the courtroom.)

THE COURT: All right. Can we retire in chambers?

(The following proceedings were held in chambers:)

MR. IMHOFF: May I comment on that or should I wait?

THE COURT: Very well. You may comment.

MR. IMHOFF: The Bonanza Printing case involves a traversal on a search warrant and a 1538.5

motion to suppress evidence, and actually what happened there was that the People did not produce any evidence.

According to *In re Gianninni* standards of expert testimony, the evidence was suppressed because the People just did not put on any evidence. There was a lack of evidence, lack of proof. Under those circumstances, they held that the evidence should be suppressed because the People did not carry their burden of proof by any evidence on the obscenity of the material.

On the traversal of a warrant, on a pretrial determination like that, the defendant, as it points out, goes forward with the case to try and show that it's protected. The People have the burden at that point of responding and going forward with the evidence. So you cannot say that because of that decision,—that those magazines are not obscene under the law. They did not judge the publications themselves as a whole. They just really held that the People didn't meet their burden of proof because they didn't put on any evidence, under *Gianninni* standards.

MR. McDANIEL: Your Honor, let me point out to the Court that that doesn't meet the actual thing which is that there was a specific finding by the Appellate Department in appeals court that this material is not obscene. And that's in the first paragraph of the opinion, starting out right there.

MR. IMHOFF: That was not really a trial on the merits, your Honor. They were dealing with probable—

THE COURT: Was there a subsequent trial on the merits in this case or is this a final opinion?

MR. McDANIEL: It's a final opinion, your Honor, and that's a specific finding by the Appellate Court.

It's not merely a reiteration of what's below, as you see by the—

THE COURT: It says the case involves more than a motion to suppress a search warrant under Penal Code Section 1538.5. While the proceedings were originally begun under that section, a traverse of grounds of issuance of a search warrant was filed by the defendant, and all parties agreed; that the issue of whether or not the material underlying the complaint was in fact constitutionally protected material would also be determined. Thus, the cause must be determined in light of Penal Code Sections 1539, 1540, as well as 1538.5.

So they're talking about the search warrant sections plus the 1538.5 section.

MR. McDANIEL: The paragraph that starts off the opinion makes the clear holding that the material is not obscene. It couldn't be clearer.

MR. IMHOFF: I think you have to read the whole case, your Honor, and find out what they really held in that case. If I put this case on and didn't put on any evidence as to the prurient appeal or the contemporary community standards, you would have to grant an 1118 motion. I mean there would be no proof.

THE COURT: Well, in order to find that the subject matter was constitutionally protected, it would have to be a factual determination of whether or not the subject matter was obscene. It appears, under sub-head 4, page 847:

"Due process of law entitles the claimant of seized property to an early court hearing to determine whether the articles were subject to seizure. The determination may be had in advance of the trial of the criminal action which ordinarily follows the seizure. The purpose

of Penal Code Sections 1539 and 1540 is to provide the owner of seized property with a readily accessible court to pass on lawfulness of the seizure by offering the claimant an opportunity for challenge under Sections 1539, 1540 and review of an unfavorable decision"—

MR. IMHOFF: Actually, after a pretrial determination on obscenity, if the trial court under a search warrant situation holds that they cannot rule it's not obscene, there has to be a trial on the merits after that. That does not end it.

MR. McDANIEL: What happened in this case was that we went on to a hearing on whether or not the charged subject matter of the seizure was obscene or not obscene. The court below held it was not, and that viewpoint was explicitly held in the Appellate Court opinion, that it is not obscene material. It does not meet the constitutional test for obscenity. That's in the first paragraph of the opinion, and that's a final decision on the material. There was an appeal taken by the prosecution from that finding below to the Appellate Department wherein this holding then emerged.

THE COURT: The trial—

MR. IMHOFF: That's because, your Honor, the People did not go forward with any evidence on the issue of obscenity in that case. If the People do not put on expert testimony as to the contemporary community standards and the prurient appeal of the material, then it can't be found obscene. I mean there's no way. I mean they have to produce this testimony on—even on a pretrial determination such as this, they have to go forward with something. And they didn't go forward with anything in this case. Well, defendant went forward with some evidence.

MR. McDANIEL: Yes, there was evidence that was in the record and—

THE COURT: You see, there was a stipulation by the parties in this case. All parties agreed: "That the issue of whether or not the material underlying the complaint was in fact constitutionally protected material would also be determined." Thus the cause must be determined in the light of Penal Code Sections 1539 and 1540, as well as 1538.5.

MR. IMHOFF: Yes, they made a stipulation to try that issue, but the People just merely failed in their proof. That was all that happened in that case.

MR. McDANIEL: Of course, the prosecution could claim in any case where there's been a finding of not obscenity—that doesn't mean anything. But that isn't the point. The point is that courts, including an appellate court, have held that the material is constitutionally not obscene.

MR. IMHOFF: No. That's not true. I mean courts will hold, you know, well, a particular thing has redeeming social importance or something like that that saves it from being considered obscene, that the lower court was in error on—

THE COURT: Basically, what you're saying is there was no factual determination as to the quality of this material in this case. Is that what you're saying, that it was—

MR. IMHOFF: Because there was no evidence they had to hold that it was constitutionally protected. They had to hold—I mean they couldn't—the People didn't offer any evidence on the issue, your Honor. They couldn't hold that it was—that it may be obscene and hold it over for trial.

MR. McDANIEL: Well, as a matter of historical

fact, the Appellate Department specifically found that the material was not obscene and indeed constitutionally protected. That's the problem that I don't think counsel's argument meets.

THE COURT: All right. Let me muse on this, and we'll rule Monday morning. And all parties and witnesses in the case of People versus Kaplan are excused at this time and ordered to report back to this courtroom at 10:30 a.m. Monday the 25th of January, 1971, without further order, notice or subpoena.

(Recess taken.)

LOS ANGELES, CALIFORNIA,
MONDAY, JANUARY 25, 1971
11:25 A.M.

(The following proceedings were had in chambers:)

THE COURT: Okay. We talked about prospective Defendant's A as being used in cross-examining the expert. Of course, at this stage the only rulings that are being made are as to whether or not the material submitted can be used as impeachment material insofar as the expert is concerned; and this is not intended at this time as a ruling on the admissibility for other purposes of the material.

MR. McDANIEL: And I believe we were just working on—I believe you had ruled on Exhibit A, that it wouldn't come in for impeachment purposes. At least, that was the substance, I think, of your ruling.

So on Exhibit B, which is in a rather different factual and historical category, the point where I believe we left off our discussion on—what was it, the 22nd, Friday? At this point I had pointed out that the

Appellate Department had indeed held these materials to be constitutionally protected, by exact language starting out right in the first paragraph of that opinion. I think counsel's arguments are not relevant to that exact point, your Honor, and I think that these—this material has been terminally adjudicated not obscene by an appellate court in a ruling which, of course, is binding on the Court here.

And so, again, I think that this type of material offers a great deal of substance to the view that the testimony of this witness is impeached by this material, and I, of course, would go through certain foundational questions with the witness. But I think that it's proper for me to use this Exhibit B in this regard.

THE COURT: There's one factor that the Court has been concerned with, to the effect that in laying foundation for qualifications of this witness, the witness has indicated that he has not taken into consideration court decisions but that he has consulted psychiatrists, psychologists, other law enforcement agencies, the survey, et cetera. So the problem would be presenting this material strictly at this time—strictly for the purposes of impeachment.

What is your offer of proof as to how this would fall within the scope of the direct examination and within the materials relied on in establishing expertise?

MR. McDANIEL: All right. Let me take it from this point of view, your Honor.

Basically, what we have here is a witness testifying based on certain factors in his background which is testified to in his qualification testimony. But basing his testimony on that material, he's come up with testimony in this criminal case that—for instance, in one regard, that the items charged in this case go sub-

stantially beyond the customary limits of candor using contemporary standards to determine that.

Now, case decisions on material where material is adjudicated as not obscene, particularly by an appellate court, which adds more luster, I would submit, to the opinion than that Municipal Court level decision, tends to do several things in First Amendment law.

One thing that they do is they tend to establish certain standards, and those standards are standards which affect in various ways what our contemporary standard is. That is to say, the Supreme Court, for instance, in a given case rules that Item X is not obscene. That becomes part of the standard. And you can't go to an essentially identical material to that material that's been found not obscene by the higher court and say that this still presents a trial issue of fact as to whether it's obscene, if indeed it's substantially identical, and—so that the fact that this material in Exhibit B, Defendant's Exhibit B here, is material that's been terminally adjudicated not obscene tends to help show what the real standard actually is.

In that regard, it quite inescapably tends to show that the standard utilized by this officer in his alleged expert testimony is not the proper standard. And for that purpose I think it's fair to say that this material does impeach the testimony of the officer. In other words, it is a factor which is a historical and legal factor at this point, and it does tend to impugn the credibility of his testimony even though it may be said that he didn't base his opinion on that. It's still not completely what he based his opinion on, but he did testify over-all that the material exceeds these standards substantially. These magazines being terminally adjudicated not obscene tends to show that that is not an accurate

statement. And I think that they can come in on that basis to impeach him.

MR. IMHOFF: May I respond?

THE COURT: Yes, you may be heard.

MR. IMHOFF: First of all, the officer's standards that he's testifying to are standards gleaned from the community itself. They may very well disagree with what an appellate court adjudicates in one particular case.

One thing that's very important here, I think, is in the Bonanza case they made no specific findings as to why it was constitutionally protected. I've pointed out that the People presented no evidence on the issue, and that was the reason. But it may very well have been that the court felt it had redeeming social importance and it could very well go beyond customary limits of candor of the community. It could very well have prurient appeal—we don't know that—and still be held to be constitutionally protected for the reason that it might have had redeeming social importance or some other factor.

There are three elements to the test of obscenity, and they have to coalesce. But the first two elements can be met and be true; and the third element of redeeming social importance may not be met. But Bonanza doesn't tell us anything about the reasons why it's constitutionally protected except that the defense went forward with some evidence on the issue. The People presented no expert testimony in accordance with *In re Gianninni*. They presented nothing. And so the court couldn't do anything else but what they did.

So for the defense counsel to ask the witness, for purposes of impeaching on one element of the test of

obscenity, of contemporary community standards, and by that hope to impeach his opinion, I think, is not relevant. It does not go to the issue. Those magazines are not in issue in this case. The only thing that's in issue are the magazines in this particular case. The—if he wants to impeach an opinion of an expert, I think the proper way—the only way is to bring in another expert who will testify and give his opinion.

If we were trying a murder case and a psychiatrist was on the stand and said that he thought the defendant was insane at the time of the trial, defense counsel couldn't bring in another defendant from another case and ask the psychiatrist to examine him and say, well, do you think he was sane at the time of trial; and he may say Yes. And then he may say, well, the court just found him legally sane at the time of the crime. You know, this is—I think we're getting to the point of being ludicrous here when we try to impeach the witness on a point.

And counsel may not ask an expert witness on cross-examination on any matter that the expert has not relied on in forming the basis of his opinion. That's in the Evidence Code.

MR. McDANIEL: Well, let me respond to that, if I may, your Honor.

First of all, the Court here makes a clear holding that the material is not obscene. It does not meet the constitutional rules for determination of obscenity as laid down by the Supreme Court of the U.S. It cites actually four cases to support that proposition, Redrup, Zeitlin, Noroff and Panchot.

Now, since I was the attorney who handled this case both, as I recall, at the trial level and during the argument in the Appellate Department of the Superior

Court, I think I'm in a position to perhaps supply a little more information.

(There was held a short recess.)

MR. McDANIEL: In this case, I have a suspicion which may not be correct; but as I recall I don't think that this *Gianninni* case even existed at the time of the first hearing on this particular case. I don't know if that's particularly relevant, but I seem to recall that that case was decided subsequently to the decision by Judge Ackerman on the trial level in this Bonanza case.

THE COURT: It was not the trial level. It was—it went up on a denial of a motion to suppress the evidence, pretrial motion.

MR. McDANIEL: Well, no. It went up on a granting of the motion to suppress on the basis that the material underlying the complaint was not obscene, which was—this issue, as it's indicated in this opinion, was reached by the court going beyond the mere 1538.5 issue. And so the judge ruled there that the material was not obscene.

And the prosecution actually took that case up to the Appellate Department attacking that determination. The Appellate Department supported that determination and specifically found that the material was not obscene.

MR. IMHOFF: I don't believe they said it was not obscene. They said it was constitutionally protected, and they made no specific findings as to why. They didn't talk about any of the three elements. And the basic reason is obviously in that the People produced no evidence on the issue where the defense did produce some evidence on the issue. But you cannot take

a case like that, say it's constitutionally protected without knowing why, which elements they decided were not met and then pick out one of those elements and attempt to impeach an opinion of an expert on contemporary community standards.

We're not talking about the same thing here. You can only impeach the expert on—you know, what he relied on as the basis of his opinion, and things that he testified to. But this is totally irrelevant as to his opinion as to the matter in issue, as to what happened in another case.

MR. McDANIEL: Well, your Honor, that—

THE COURT: Well, this is one area that the Court has been disturbed with—and I think the problem can be resolved. The officer testified that his survey showed that semi-nudity depictions were beyond the customary limits of candor, from his survey, although this subject matter was not gone into. There was a statement by him of the survey. Of course, now this is being offered at this time for impeachment purposes. I think that the Court has to take judicial notice of the fact that the Appellate Department of the Superior Court found that the depictions in these two magazines which constitute Defendant's B, were found not to be obscene. But the question is whether or not this would be proper cross-examination of the expert. I don't think so.

But at the time that the defendant puts on his case I will take judicial notice—we'll receive the document. The jury will be apprised of the fact of the Appellate Court's finding, and they may use these exhibits as a guideline, make a determination—I will say for the record that the two documents marked Eager Beaver, Volume I, No. 1, and Fluff, Volume I, No. 1, comprising Defendant's B—I don't see a date on these but

I think they're the only copies of these magazines that you have submitted, are they not?

MR. McDANIEL: Yes. There were two other magazines in the case which I don't have copies of, so—

THE COURT: These publications depict female nudity, exposing the genitalia. Now, the subject matter before the Court that's People's 1 and People's 3 depict male and female nudity, exposing the genitalia, with the male and female being in close proximity. Therefore, Defendant's B is not exactly comparable but could be a guide for the jury; but I don't think it would be appropriate subject matter for cross-examining this officer. The comparability may be argued in argument, and I think the exhibit must be received by this Court.

But I'm not going to permit it for purposes of impeachment of the officer.

MR. IMHOFF: May we at the time be heard on the—

THE COURT: All right. I'll give you a chance to be heard. I'll say that appears to be my first-blush impression at this time. I will hear further argument at any other time that the exhibits are offered.

All right. Now, we go to C which is Jaybird.

Do you want to enter further arguments as to B?

MR. McDANIEL: Well, just one sentence, your Honor. I've already said it; but just so the record is clear, it's my view that the material—and I agree with the Court in some of the Court's comments. But regarding the issue of whether it's proper to impeach by that material in B, I'd just submit that I think that it's proper because he's testified that the material is substantially beyond the standards. And whatever his reasons for making that statement in his testimony, I

think that it's proper always to impeach by showing, by factual and legal means, that the standard he's talking about has to be the wrong standard. And I think that that's the way that these court-decided materials come into focus on that issue.

I'll submit it on that basis.

THE COURT: That's argumentation which — you'll be permitted to argue that. The narrow question before the Court at this time is whether this subject matter can be used for impeachment purposes of this officer.

All right. Now, Exhibit C constitutes a magazine entitled Jaybird, Photographer No. 9, 16 pages of full color. The pictures are depictions of nude male and female subjects in the same picture.

MR. McDANIEL: Now, with regard to this publication, Defendant's C, Jaybird Photographer No. 9, that is one of approximately 20 publications which were found to be not obscene by the United States Supreme Court in the case of Bloss against Dykema, Supreme Court No. 1347, and that was the October Term '69. The decision came down in March of 1970. It's referred to in one of the materials which I offered to this Court previously, a book entitled Supplement to Selected Obscenity Cases, 1970. And the cite for Bloss versus Dykema is 90 Supreme Court 1727.

And, as I say, in that case, this magazine, Photographer, plus perhaps 18 to 20 other publications, were found to be not obscene by the Supreme Court. And again, I would offer at this point for purposes of impeachment, because where the Supreme Court has ruled that does indeed set a binding standard on prosecutions both in this state and in the nation, and this one, of course, also has men and women together in it

completely in the nude. I think that it helps to support the thesis that this witness' testimony could be impeached by bringing this Exhibit C before him with pertinent questions adduced.

And I would submit it on the reasoning previously given to your Honor on Exhibit B, plus the additional phraseology I've just utilized.

THE COURT: Very well.

MR. IMHOFF: Do we have the 90 Supreme Court 1729 available?

THE COURT: It's available to us. I think the same reasoning would apply here. This, in the Court's offhand opinion at this time for purposes of this discussion, would appear to be, from the depictions in the photographs, more comparable to the material before the Court, in that it depicts male and female nudes in the same photograph. I would comment that there is copy contained in Defendant's C. There is no copy contained in People's 1 and People's 3.

MR. McDANIEL: I would offer, as an officer of the court, to make one statement to your Honor.

THE COURT: Again, I think the same reasons for excluding it for purposes of examining this officer would apply as to Defendant's B. However, if the Supreme Court has in fact found these not to be obscene, the Court will take judicial notice of that fact and receive the—possibly receive the exhibit when the defense puts on its case.

MR. McDANIEL: Thank you, your Honor. I'd—I make the assertions as an officer of this court that the facts I've stated are correct about that publication. I was just going to add that I happen to know that it was not a decision based on anything that had to do with the factual matter. It was based on nonobscenity

on the photographic material, and that doesn't come out in the opinion but I checked into it.

THE COURT: In the inexpert view of the Court, it appears that these pictures are more artistic in composition than the others.

MR. McDANIEL: Better photography, perhaps.

THE COURT: But in any event, they may be admissible for other purposes.

All right.

MR. McDANIEL: Let me ask your Honor to examine C, D and E together at this point. Exhibits D and E are magazines, The Foxes and Fantastic.

MR. IMHOFF: May I ask that, at the time the defendant offers, if he intends to offer these other subjects that we have just discussed, would we have the opportunity at that time for another hearing on their admissibility?

THE COURT: Yes, we'll have another hearing to determine their admissibility.

MR. McDANIEL: Now, with regard to—

MR. IMHOFF: Is this D and E?

MR. McDANIEL: Yes.

THE COURT: Defendant's D is a magazine entitled The Foxes, and E is another magazine entitled Fantastic.

Defendant's D does not appear to have any textual material and depicts single nude females and two or more females together.

MR. McDANIEL: Judge, perhaps I can speed this up. May I ask this question?

Considering most of the rest of these offered exhibits, if the thrust of the Court's reasoning is as stated on B and C, I would suspect that that reasoning would apply to these other comparable exhibits; and I don't

see much necessity for going through each of these step by step at this time, if that is indeed the case. And so—

THE COURT: Well, are these magazines, D and E, material that was—that has been ruled not obscene?

MR. McDANIEL: Yes.

THE COURT: I think the same rulings would apply in each of these cases, based upon the reasoning previously stated by the Court.

MR. McDANIEL: Well, then I won't take the Court's time to go through at this point—

THE COURT: Are you making the same representations with regard to F?

MR. McDANIEL: D, E, F, G, H—H is on a different basis, and I is on a different basis.

THE COURT: Well, let's go to H and I, then.

MR. IMHOFF: May I ask counsel a question?

THE COURT: Surely.

MR. IMHOFF: On D and E, what specific case were they involved in?

MR. McDANIEL: People versus Church and Lewis. But I won't get into argumentation on them at this point.

Just briefly, Exhibit H—

D through G, I take it, the Court's ruling would be the same?

THE COURT: Yes.

MR. McDANIEL: And on B and C. So I won't go through any discussion of those at this time, and I'll go on to just mention briefly—and perhaps you don't even need to inspect the publications, or perhaps you'd like to.

H and I come in on a different basis, your Honor. Those are two magazines which I—

THE COURT: Would you do this for me? We don't have to do it now. But if you'll give me the cases involving D, E, F, and G while the case is going on, I'll read those decisions.

MR. McDANIEL: Well, they're unreported cases. I'd ask you to take judicial notice of them subsequently; but the cases are People versus Church and Lewis on D and E. That's Municipal Court No. M-21982, Beverly Hills Judicial District.

On the subsequent two, F and G, F and G are from the two cases People versus Graham and Snavely, No. M-93185, and People versus Paulitch and Luros, No. M-93350, Municipal Court of the South Bay Judicial District, County of Los Angeles.

So that brings us, I believe, up to Exhibits H and I, and those are magazines called Close-Up and Playmates. These two magazines I offer at this time again in impeachment terms as some exhibits of what the actual contemporary standard in this state is, in contradiction to what the witness had in his testimony, because these are publications which I just went out and purchased myself at random in bookstores. Actually, both of these two were purchased in L.A. County at various bookstores by myself, and I think they tend to show some evidence of the caliber, type, graphicness of material that's currently offered and sold.

There's no prosecutions pending on either of those two publications that I'm aware of. And so those are offered in again as supplemental material which will, in questioning the officer, tend to impeach his testimony.

MR. IMHOFF: Well, your Honor, just because something may be available on the market does not set the standards for the community. I mean there are

hundreds and thousands of magazines and books that are available on the market, and there are hundreds and hundreds of prosecutions pending against them. They may or may not be legally obscene. These magazines may well go beyond the contemporary community standards of the community. And just because you can go down and buy something, it does not—is not relevant to the standard of the community. I can go out and buy any kind of a book on the market and say, well, this is the community standard. I could go out and buy the bible or some other publication of any kind and say this is the community standard. It's not relevant to show the community standard. Counsel well knows we have hundreds of cases pending with his office or, you know, we wouldn't be here now if we didn't have them. And it would suggest to the jury that these magazines are legal because you can purchase them.

MR. McDANIEL: Well, your Honor, let me respond to that comment by counsel in this fashion:

First of all, you never prove anything in a criminal case or any other case by one item that proves the whole thing. Each item that you bring forward is an element of proof as one element.

(Whereupon, there was held a recess.)

MR. McDANIEL: I was just saying that you don't prove things by a one-shot approach. You prove things much in the fashion that you build a bridge or build a brick wall, piece by piece. This evidence is supportive of the view that contemporary standards are indeed quite different than what the witness would have the jury believe.

And I think that the aid in impeaching him in that regard—I would refer the Court, for the validity of

evidence that comparable materials purchasable tend to show that standard, to the case of *In re Harris*, California Supreme Court 56 Cal. 2d, I believe, 879. That case discusses three different types of evidence on customary limits of candor or contemporary standards and holds that the refusal to allow defendant to bring those materials before the trier of fact is a denial of due process. They set out three separate categories, expert testimony, comparable writings adjudged to be not obscene and pictures adjudged to be not obscene, and comparable writings and publications purchased in the community.

And so that case tends to support the thesis that I'm offering it for at this time.

THE COURT: Well, it's now 12:15. I don't want to keep the reporter from her lunch. So why don't we resume this at 1:30. I'll read this in the meantime.

(There was held the noon recess.)

LOS ANGELES, CALIFORNIA, /

MONDAY, JANUARY 25, 1971, 1:40 P.M.

(The following proceedings were held in chambers:)

THE COURT: All right. I've read the *Harris* case.

MR. McDANIEL: That's the basis of my offer on D and E.

THE COURT: Well, as I interpret the *Harris* case, the defendant was precluded from offering any proof as to contemporary community standards. They were precluded from introducing expert testimony, comparable writings and pictures adjudged in Los Angeles County to be not obscene and comparable writings and publications purchased in the community. All the offered evidence was excluded by the trial court.

"Petitioner contended before the trial court and contends here that he was thus denied due process of law."

The Court would conclude that the fact that somebody is willing to sell something does not necessarily mean that it's accepted in the community.

I will reject the offer of proof as to Defense H and I.

MR. McDANIEL: May I inquire at—at a subsequent point we'll have to, of course, I presume, go over this again on comparable offers in defense's case. And I'm wondering if your Honor might be inclined—

THE COURT: Well, I'll hear any further authority that you have on that point, however.

We'll, all right. We'll leave it at that.

Now, what about these other—

MR. McDANIEL: Well, Exhibit J is a little bit different than the others, and I'd like to just briefly mention, on Exhibit J, that's the book entitled Adam and Eve. This is a book found not obscene by the United States Supreme Court in the Hoyt case which I've previously cited to your Honor. I believe that was Hoyt against Minnesota, 90 Supreme Court 2241.

The Supreme Court found that and several other books not obscene. And I won't go through the same type of argument but would submit again on the impeachment issue that it would be relevant on that issue at this time. It is constitutionally indistinguishable from the exhibit which is the book in this case. I'm not sure which People's exhibit that is at this point, but—

THE COURT: The book, I believe, was 2.

MR. IMHOFF: 2, I think.

THE COURT: You make an offer of proof this

is comparable to 2 and that the material was found to be constitutionally nonobscene?

MR. McDANIEL: Yes.

THE COURT: Well, I won't permit it for impeachment purposes of the officer. However, I will reserve ruling on the admissibility when the defense puts on its case in chief.

MR. McDANIEL: I'd like your Honor to take judicial notice of the fact that the book was found not obscene by the Supreme Court in the Hoyt case, in the fashion that I've indicated previously.

THE COURT: What's the citation number?

MR. McDANIEL: That is 90 Supreme Court 2241.

MR. IMHOFF: I've asked the Court to reserve its—

THE COURT: I'll reserve the ruling. However, I will make the representation that, should it be comparable and should it be held by the Supreme Court to be not obscene, the Court will consider taking judicial notice, submitting it into evidence for the jury—

MR. McDANIEL: I will just now go onto Exhibit K which is the Report of the Presidential Commission.

THE COURT: Yes. That's—on Obscenity and Pornography, right?

MR. McDANIEL: Now, I ask the Court to consider this by way of an offer of impeachment material against the officer; that that Commission report—the testimony shows the officer has read—he's indicated that he's read the Commission report, and he indicates that he does not rely on the survey that is included in that Commission report. The survey—if I may take the book for a moment I'll show your Honor what page that appears upon.

Your Honor, for purposes of this examination, the relevant parts here are starting on page 410 and going

over through, well, 412, 413. But the significant fact is there on the top of the right-hand page as you're looking at it.

And under evidence law it's proper to interrogate an alleged expert witness on other writings in his field which tend to contradict what he said and which he's indicated that he's familiar with but doesn't follow. So that I think it is proper to interrogate the officer by way of this material which he said he's read and doesn't use; that the evidence law is that you can't interrogate an expert witness on other materials in his field of expertise than what he claims he relies upon, particularly where, as here, he's indicated that he's read the material.

So that, again, I think this goes to impeach his survey or his standards-type testimony pretty dramatically. And I offer it for that purpose at this time.

THE COURT: Well, the survey, survey to determine what public opinion is, purportedly what public opinion is, as to the wisdom or necessity of law prohibiting dissemination of pornography and obscenity—

MR. McDANIEL: Well, your Honor, it would tend to show that where the majority—

THE COURT: The advisability of the law is not in issue here. We're bound by the existing law.

MR. McDANIEL: Let me explain why I think that it's not exactly that.

First of all, you have to look at that material because the survey is broken down in several ways, and it goes through a run-down of that in the few pages on it there.

But, basically, when you have an opinion survey which shows that the majority of adults feel that any type of material, including explicit sexual material,

which is, of course, something that is not involved in this prosecution except in the printed form—that tends to show a standard as a matter of fact. It tends to show that the standard is that adults today feel that any material, including explicit sexual material, is within that standard of tolerance.

And so that when they make the survey statement that any laws proscribing the dissemination of explicit sexual material to adults—that they're against those or that they feel such material should be allowed, that quite clearly tends to show a standard.

And, again, I think an objection to that survey could go to the weight of it in the same way that an objection to this survey could go to the weight of it.

But I think that it does supply some important relevant statistical data to impeach this officer.

MR. IMHOFF: I would like to point out that I believe, under the Evidence Code the officer may not be cross-examined on any treatises or journals or works that he did not rely on as forming a basis of his opinion. And we're dealing here with a California statewide standard. The President's Commission on Pornography and Obscenity would be irrelevant and hearsay. It's just an executive advisory study. There's no way of cross-examining people who conducted the survey or anything like that. It's irrelevant, incompetent for impeachment, especially, and to prove contemporary standards of the State of California.

MR. McDANIEL: Well, the State of California is part of the nation. This is a national survey. It clearly would cover California as well as the rest of the country. And—

THE COURT: Well, I don't think that the—well, we have to consider the purpose of the survey was to determine whether or not there should be legislative

changes, et cetera; and should the Congress decide that it should or it should not is up to the Congress. I don't think that the particular survey referred to here would have any bearing in this court because we're bound by the laws that now exist. Should the State legislature or the Congress change the law, that's—that would present another matter.

MR. McDANIEL: Well, yes, I understand that, but—

THE COURT: I don't think that the subject matter is relevant to this case. Therefore, the defendant's offer as to Defense K is rejected.

MR. McDANIEL: That's for this impeachment purpose. You wouldn't be ruling on any other use of this material at this time?

THE COURT: Well, we'll see if it can become relevant on some other issue. I don't know. But I will reject it at this time for this purpose.

MR. McDANIEL: Now, I won't go through the rest of those materials. I won't offer them at this time for impeaching the witness.

THE COURT: All right. That's as to L, M, N and O.

MR. McDANIEL: And the films.

THE COURT: Withdrawn. All right. Withdrawn at present. And P.

Now, insofar as these are concerned, they will be offered later on the defendant's case in chief?

MR. McDANIEL: Yes, they will.

THE COURT: All right. Now, will it be necessary for the Court to view these items outside—the motion picture films, outside the presence of the jury?

MR. McDANIEL: Only if your Honor thinks that would become necessary. The film itself—

THE COURT: I don't know what your purpose is—

MR. McDANIEL: I'll tell you what that is. That set of reels of motion picture film came out of a case where there was just a finding of nonobscenity, and there's specific facts involved. The jury specifically found that the material in those three reels was within the customary limits of candor.

THE COURT: A court of comparable jurisdiction?

MR. McDANIEL: Yes. And it's, I think, extremely relevant to the interest of a fair trial to allow me to use this material, particularly where there was a specific finding like this—

THE COURT: The issue presented to the jury was—

MR. McDANIEL: Customary limits. And they decided it on that basis. And we have a transcript of their actual statement to that effect which I will be bringing into the court.

THE COURT: Well, we'll consider that at the appropriate time, then.

Are we ready to proceed with the cross-examination of the expert witness?

MR. McDANIEL: Yes, I think so.

THE COURT: All right.

(The following proceedings were held in open court:)

THE COURT: Case of People versus Murray Kaplan.

The record will show the defendant is represented by counsel, the People are present and represented, and the jurors are all seated in their respective places in the jury panel box.

Officer Blackwell has resumed the witness stand.

You may cross-examine.

MR. McDANIEL: Thank you, your Honor.

HUBERT E. BLACKWELL,

resuming the stand as a witness by and on behalf of the People, having been previously duly sworn, was examined and testified further as follows:

CROSS-EXAMINATION

BY MR. McDANIEL:

Q Officer Blackwell, you have read the President's Commission Report on Obscenity and Pornography. That was your testimony; is that correct?

A Yes, sir.

Q What was the result of the survey undertaken for the Presidential Commission? What did they determine in this survey?

MR. IMHOFF: Object, your Honor, as no foundation, irrelevant, immaterial.

MR. McDANIEL: I'll rephrase the question, your Honor.

THE COURT: You're withdrawing the question? Very well.

BY MR. McDANIEL:

Q You have read that presidential report. That was your testimony; is that correct, Officer Blackwell?

A Yes, sir, I did read it.

Q And do you recall reading the survey included in that particular work?

MR. IMHOFF: Object again, your Honor; no foundation, no showing of reliance as a basis of forming an opinion; no relevancy; calls for hearsay.

THE COURT: The objection will be sustained.

BY MR. McDANIEL:

Q Now, Officer Blackwell, you went off on this tour of questioning people at Safeway Stores or markets. That was starting out back in April, is that correct, or was it before that?

A No. It's in March, sir.

Q It started out in March?

A Yes, sir.

Q And before you went on that survey, you had been involved in the investigation and the prosecution of cases involving alleged obscenity for some 2½ years; is that correct?

A Yes, sir.

Q Now, I asked you before but I will ask you again, have you ever testified in a case such as this for the defense?

A No, sir.

Q And is it fair to say, Officer Blackwell, that you do have a bias in favor of the prosecution's side of this particular case?

MR. IMHOFF: I'll object, your Honor. That calls for a conclusion.

THE COURT: Sustained.

BY MR. McDANIEL:

Q Well, Officer Blackwell, in your viewpoint, there should be convictions in cases such as this; is that correct?

MR. IMHOFF: I'll object again, your Honor, as irrelevant.

THE COURT: Sustained.

BY MR. McDANIEL:

Q Do you have a personal view of obscenity as opposed to a professional view of obscenity, sir?

MR. IMHOFF: Object, your Honor, as irrelevant, and calls for a conclusion; beyond the scope of the direct.

THE COURT: The objection will be sustained.

BY MR. McDANIEL:

Q Approximately how many prosecutions for al-

leged obscenity have taken place because of arrests that you yourself made, sir?

MR. IMHOFF: Object again as irrelevant.

MR. McDANIEL: Your Honor, this goes to see if he's biased.

THE COURT: Overruled.

You may answer.

THE WITNESS: That have gone to trial?

BY MR. McDANIEL:

Q No. Just prosecutions instituted.

THE COURT: By yourself.

Is that the question?

MR. McDANIEL: Yes.

THE WITNESS: Approximately 300.

BY MR. McDANIEL:

Q Does that mean that you've made 300 arrests yourself?

A Yes, sir.

Q And that's over a period from '68 through the present; is that correct?

A Yes, sir, a period, roughly, of three years.

Q Have you taken occasion to familiarize yourself with the material, both pictorial in magazine form and in motion picture film form, which have been the subject of obscenity prosecutions wherein the result was that the material was found to be not obscene but rather constitutionally protected material?

MR. IMHOFF: Object, your Honor; calls for a conclusion; compound, complex, irrelevant.

THE COURT: Objection will be sustained.

You may rephrase your question.

MR. McDANIEL: All right.

BY MR. McDANIEL:

Q Officer Blackwell, have you had occasion to

familiarize yourself with the findings of various courts regarding pictorial material which has been adjudicated to be not obscene material?

MR. IMHOFF: Object, your Honor, as being irrelevant, vague as to what is obscene.

THE COURT: Overruled.

You may answer.

Within the State of California?

MR. McDANIEL: Yes, within California.

THE WITNESS: I can't think of any right now, no sir.

BY MR. McDANIEL:

Q In other words, you're not familiar with such decisions; is that correct?

A Well, I read the case law pertaining to decisions that are handed down, sir, but I don't try to memorize them. I'm certainly not an attorney.

Q Are you familiar at all with a case wherein there was a finding of nonobscenity, which case was called *People versus Bonanza Printing Company*?

A Yes, sir.

Q Have you seen materials that were determined to be not obscene in that case?

MR. IMHOFF: Object, your Honor; assumes a fact not in evidence.

MR. McDANIEL: I just asked him the question, your Honor.

THE COURT: The objection is overruled.

You may answer the question.

THE WITNESS: I don't know if I've seen the material or not, sir. I don't know which books they are.

BY MR. McDANIEL:

Q Have you read any of the decisions by the United States Supreme Court regarding materials which

have been litigated and determined to be not obscene in the past two years, sir?

MR. IMHOFF: Your Honor, object as being irrelevant and vague.

MR. McDANIEL: Going to see if he's an expert in this field, your Honor.

THE COURT: The objection will be overruled. You may answer.

THE WITNESS: Yes, sir.

BY MR. McDANIEL:

Q Are you familiar, for instance, with the finding by that court in the case of Bloss against Dykema wherein certain paperback books were found to be not obscene?

MR. IMHOFF: Object; assumes a fact not in evidence.

MR. McDANIEL: Doesn't assume any facts, your Honor.

THE COURT: The objection will be overruled. You may answer.

THE WITNESS: No, sir, I have never heard the case.

BY MR. McDANIEL:

Q Is it fair to say, then, today as you sit here, Officer Blackwell, that you're not really sure of exactly which caliber of materials, in terms of explicitness, have been adjudicated not obscene in final decisions, and so you can't make that part of your basis for determinations?

MR. IMHOFF: Object, your Honor. That calls for a conclusion. It's irrelevant.

MR. McDANIEL: Your Honor, an expert witness offers conclusions.

THE COURT: The Court is ruling. And, gentlemen, you'll have to abide by the Court's rulings.

Objection's overruled.

You may answer the question.

THE WITNESS: Yes, sir.

BY MR. McDANIEL:

Q Now, I believe you said that you based your testimony on this supermarket survey which you were involved in plus your experience as a police officer involved in obscenity prosecutions; is that correct? Are those the two basic areas that you get your expertise from?

A Along with other areas, yes, sir.

Q Do you rely in part in your determinations on your discussions with other police officers in your department and other departments engaged in prosecution of obscenity cases?

MR. IMHOFF: Object. It's been asked and answered.

THE COURT: Yes, I believe that question has been answered. But this is cross-examination. The objection will be overruled.

You may answer.

THE WITNESS: That does have some bearing on it, yes, sir.

BY MR. McDANIEL:

Q Now, Officer Blackwell, is it correct that in your view if a prosecution is instituted by members of the Los Angeles Police Department for obscenity—that you, because of that fact, would believe that indeed the materials are obscene in a given case?

MR. IMHOFF: Object, your Honor. That calls for a conclusion, for speculation, is irrelevant, immaterial.

THE COURT: Would you read the question, please.

(The question was read by the reporter.)

THE COURT: The objection is sustained.

BY MR. McDANIEL:

Q Now, Officer Blackwell, is it correct that when you went around the various, I believe, 20 cities that you've mentioned, you, in order to determine what material was being sold in those given areas, would go to local police agencies and find out what was going on from those people?

MR. IMHOFF: Object, your Honor. That assumes a fact not in evidence.

MR. McDANIEL: He testified that—

THE COURT: The objection is overruled.

THE WITNESS: We went to the bookstores and adult entertainment, this type of locations, and also to the local prosecution or the sheriff's department, police department, what the case may be, to see what they felt was the problems in this area.

BY MR. McDANIEL:

Q In other words, you did both. You went to the retail outlets, whatever sort they might be, plus the police agencies; is that correct?

A Yes.

Q And, of course, you've become familiar with what's going on in the City of Los Angeles, is that correct, from your work?

A Yes, sir.

Q Approximately—first of all, I'll ask you this question, sir.

Are there motion picture theatres and places where you can buy motion picture film and arcades in the City of Los Angeles which show color motion picture

films which depict graphically acts of sexual intercourse and other sexual acts between men and women?

MR. IMHOFF: Object, your Honor, as irrelevant and—

THE COURT: Overruled.

You may answer.

MR. IMHOFF: Beyond the scope of the direct examination.

THE WITNESS: Yes, sir.

BY MR. McDANIEL:

Q The answer is Yes?

A Yes, sir.

Q And you have been in such locations yourself, isn't that correct, sir?

A Yes, sir.

Q Approximately how many motion picture theatres are there in the City of Los Angeles which feature motion picture films of the type that I've just described?

MR. IMHOFF: Object again, your Honor, as irrelevant and immaterial.

THE COURT: Sustained.

BY MR. McDANIEL:

Q Approximately how many motion picture theatres in the City of Los Angeles are you personally familiar with which show motion picture films graphically depicting sexual intercourse, sir?

MR. IMHOFF: Object, your Honor, as irrelevant to any issue in the case.

THE COURT: Sustained.

MR. McDANIEL: Your Honor, I'd like to make an offer of proof on that point.

THE COURT: The Court has indicated in

chambers its position with regard to this matter. There will be no necessity. The ruling will stand.

You may proceed.

BY MR. McDANIEL:

Q Approximately how many locations are there, including liquor stores and bookstores in the City of Los Angeles, which sell magazines devoted to the pictorial depiction of complete nudity and sexual activities in the magazines?

MR. IMHOFF: Object, your Honor, as irrelevant; assumes facts not in evidence; beyond the scope of the direct.

THE COURT: On the first ground, the objection will be sustained.

BY MR. McDANIEL:

Q Now, Officer Blackwell, when you went to these various supermarkets, did you make any attempt at all to show the people that you talked to any materials which depict sex and nudity which might help to show them what your questions in this thing were really about?

A No, sir.

Q Now, did you ask the following question to each of the people which you interviewed, and I quote: "Do you feel that the following activities depicted in a film, magazine or other printed material would go beyond the contemporary standards of your community? Number one, semi-nudity with no sexual activity."

A Yes, sir.

Q And was the result of your interview technique on this survey such that a majority of the people that you and the other officers talked to felt that such materials would go beyond the contemporary standards of their community?

A I'm sorry. I don't understand the question.

Q Was the result of your survey such that a majority of the people interrogated felt that semi-nudity with no sexual activity would go beyond the standards of their community?

A I believe so, if I recall, yes, sir.

Q Now, are you familiar with Playboy Magazine, sir?

A I have seen it, yes, sir.

Q And it would be correct, then, to say, would it not, that Playboy Magazine would go beyond the standards, if we based it on this survey activity which you engaged in?

MR. IMHOFF: Object, your Honor; irrelevant; calls for a conclusion, speculation.

THE COURT: Sustained.

BY MR. McDANIEL:

Q Essentially, what the result of your survey activity then is, is it not, Officer Blackwell, that any material which contains semi-nudes would be material that goes beyond the standards of the community in question?

A Yes, sir.

Q Now, none of your questions to the people that you talked to took a different form than what the questions are that are on your survey form; is that correct?

A Yes, sir, that is correct.

Q In no instance, then, during your survey activity did you ask them to determine their answers based on taking the material as a whole; is that correct?

MR. IMHOFF: Object, your Honor; assumes a fact not in evidence.

THE COURT: The question was, did he ask the question?

The objection will be overruled.

You may answer.

THE WITNESS: No, sir; just what was on the questionnaire.

BY MR. McDANIEL:

Q I see. And with regard to the question, "Do you patronize locations where this type of material is exhibited or sold?" was the result of your survey that approximately one per cent was all that had been, to locations where the material is exhibited or sold?

A I do not recall the percentage but it was low.

THE COURT: Do you have your notes with you?

THE WITNESS: Yes.

MR. McDANIEL: I believe I have a copy here, your Honor, which I would ask to approach the witness with.

THE COURT: Isn't there another copy?

MR. IMHOFF: I have one.

THE COURT: Perhaps you might permit the witness to refer to his notes. He might be able to answer these questions.

MR. IMHOFF: Your Honor, before we proceed, may I briefly approach the bench?

THE COURT: For what purpose?

MR. IMHOFF: Well, I can't tell you.

THE COURT: Very well.

Well, gentlemen, the Court is becoming a little perturbed with the undue amount of time consumed with at-bench discussions and feels that the trial has not moved with the tempo that it should.

I'll permit you to approach the bench, but I want to urge counsel to cut the non-jury time to a minimum.

All right. You may approach the bench.

Do you wish to have the reporter?

MR. IMHOFF: No, your Honor.

(There was held a discussion at the bench.)

BY MR. McDANIEL:

Q Now, that percentage question, Officer Blackwell—you've had a chance to refresh your memory by looking at your notes; is that right?

A Yes, sir.

Q Would it be approximately one per cent to that question?

A Yes, sir, 1.67.

Q Now, what time of day did you talk to people in the supermarkets? Was it at different times at different locations?

A No, sir. It was varying times in each supermarket. Sometimes it would be in the early afternoon, sometimes in the late afternoon, up until about 8:00 o'clock.

THE COURT: May we interrupt this matter for just one moment.

(Another matter was heard.)

THE COURT: You may proceed, Counsel.

MR. McDANIEL: Thank you, your Honor.

BY MR. McDANIEL:

Q Now, other than the questions that are on this questionnaire breakdown which you have a copy of in front of you, can you think of any other questions that you asked anybody at any time during this activity which aren't reflected by this survey breakdown?

A During general discussion with the person—or the person being surveyed, they would usually voice their opinion of, you know, how they felt about this, whether they thought it was terrible, this type of material, or something of this nature. And I would try to find out how they felt about this; if they think that—

what they think about it themselves, this—I might add, this was not to every individual that I spoke with, but it was with surveys, but there's no place to mark the answers.

Q Well, approximately how many times did you have discussion not reflected by this breakdown, if you can give an approximation? If you can't, of course, you can say that you cannot.

A I have no idea.

Q I see.

Now, you've testified that you also went to meetings of some prosecutors committee which met down in Coronado in the San Diego area; is that right?

A Yes, sir.

Q And what was that? That was a seminar on prosecuting obscenity cases given by the prosecuting authorities in this State?

A Yes, sir, that would be a fair assumption, I believe.

Q I take it that you have not attended meetings of that sort given by such groups as the American Civil Liberties Union or the Sexual Freedom League; is that correct?

A No, sir, I haven't.

Q You've made, in your testimony, the statement that these materials in this case appeal to a prurient interest; is that right?

A Yes, sir.

Q And you base that testimony on your background as a police officer, basically; is that correct?

A No, sir. I think it would be a lot more besides my background as a police officer.

Q That's part of it, isn't it?

A Yes, sir.

Q Is the other part talking to other people?

A Yes, sir.

Q And the people you talked to about that issue were not the people on this survey; is that right? Some other group of people or what?

A Yes, sir. On the survey alone—or, I should say, on the trip, we talked to—

Q No. Just yourself. You use “we.” Please condition yourself to only use “I.” That’s what you’re asked for here.

A Yes, sir, I have talked to approximately five or six hundred other people, some of these being bar owners, adult bookstore managers, things like this.

Q You’ve talked to five to six hundred people besides that on your survey?

A Yes, sir.

Q And you’re basing your testimony on prurience on your experience as a police officer plus your talking to this five to six hundred other people?

A Yes, sir, part of it, yes.

Q Part of it?

A Yes.

Q You also base part of it on the fact that you’ve had conversations with police psychiatrists, and so forth?

A Not police psychiatrists, no, sir.

Q By that phrase, I mean psychiatrists who are inclined to and do testify for the prosecution in obscenity cases.

MR. IMHOFF: Object, your Honor. That calls for speculation and conclusion.

THE COURT: Sustained.

BY MR. McDANIEL:

Q Well, I believe you testified that you talked to a Dr. Wagner, and that's part of your basis for this knowledge on prurience, is that correct, sir?

A Yes, sir.

Q And Dr. Wagner is indeed an individual who testifies for the prosecution in obscenity cases. Isn't that a fact?

MR. IMHOFF: Object, your Honor; irrelevant; assumes—

MR. McDANIEL: This tends to go to bias, your Honor.

THE COURT: Overruled—I mean the objection will be sustained.

BY MR. McDANIEL:

Q Now, in your testimony on prurience—I'm trying to get what you've based it on. You've based it on talking with this five or six hundred other people, on your experience as a police officer, and also on talking to those other people, such as psychiatrists; is that correct?

A Yes, sir, other law enforcement agencies also and other people that I have talked to in the field since I have been a police officer working obscenities.

Q And by people in the field, then, you mean individuals—that you come in contact with as a police officer?

A Well, yes, sir. This would be bottomless performers, things like this.

Q Well, do you feel that this consideration of prurient appeal is the same in a situation involving a bottomless dancer in a bar as it is in material in a magazine, a film or a book?

MR. IMHOFF: Object, your Honor, as irrelevant; calls for a conclusion.

MR. McDANIEL: I'd like to respond to that.

THE COURT: Would you read the question.

(The question was read by the reporter.)

THE COURT: Very well. You may approach the bench for purposes of making an offer of proof.

(The following proceedings were held at the bench:)

MR. McDANIEL: Your Honor, this line of questioning tends to—you're asking him to—if the standard is—

THE COURT: What is your offer of proof as to the relevancy of his opinion as to bottomless dancers? How does that prove or disprove any issue involved here?

MR. McDANIEL: The offer of proof is simply this: that I will prove by this and related questions that this officer uses a completely erroneous viewpoint of what is indeed prurient interest in an expressive medium which is controlled by the First Amendment, i.e., a book, magazine or film, and that he uses a viewpoint of what's prurient interest which is not what the law contemplates. And I can only establish that by a series of questions which tend to show that he has a misguided view as to what this is. And that would tend to show that his testimony as an alleged expert on this issue is erroneous, invalid, and is impeached because if he's got the wrong kind of point of view about what it is, I think I've got a right to bring that out. Otherwise, he gets to testify without being tested.

MR. IMHOFF: As to whether or not this—the only issue involved here is whether or not this material appeals to a prurient interest in nudity, sex or excretion, that is a shameful, morbid interest in nudity, sex or excretion. He's asking the witness to discuss the prurient

appeal on a hypothetical situation, material that's not before the Court, a situation that's not before the Court.

Counsel can certainly question him on prurient appeal, but I think he's gone far afield here.

MR. McDANIEL: Let me respond to that, your Honor.

The issue at this point is not at all whether or not the material has this prurient appeal. The issue is whether or not this witness' testimony was proper and credible to be believed on direct examination. It's cross-examination of the witness, and I'm trying to get into that.

THE COURT: It seems like we want to go off on a tangent.

The objection will be sustained.

(The following proceedings were held in open court:)

BY MR. McDANIEL:

Q Officer Blackwell, is your own definition of what constitutes a prurient appeal that that exists any time material, be it book, film or magazine or conduct, such as bottomless dancing, involves the explicit depiction of sex and nudity—that then you find it has prurient appeal?

A No, sir.

MR. IMHOFF: Object.

THE COURT: I take it you've withdrawn your objection?

MR. IMHOFF: Well, the answer is in, but I would object to that question as being irrelevant and immaterial, and it assumes a fact not in evidence.

THE COURT: The objection's overruled. The answer may stand.

BY MR. McDANIEL:

Q Have you ever found any material in your experience that you feel goes beyond customary limits of candor in its depiction of sex or nudity but does not contain an appeal to the prurient interest of the average viewer?

MR. IMHOFF: Object, your Honor, as irrelevant, immaterial.

MR. McDANIEL: Your Honor, this goes to—

THE COURT: Overruled.

You may answer the question.

THE WITNESS: I cannot think of any material at the present. I'm sure I have seen some.

BY MR. McDANIEL:

Q You're sure you have seen some?

A I probably have, yes, sir, but I can't think of any.

Q Can you recall when you saw such material?

A No. I have no—that's what I say. I don't remember seeing any material like this, but I'm sure that I probably have.

Q I see.

Now, what is your definition of this term prurient interest?

A A shameful or morbid interest in sex, nudity or excretion.

Q And where do you get that definition from?

A This is from our Penal Code.

Q And what do you interpret that to mean?

A Indecent to modesty, which would go beyond the contemporary community standards. This would go beyond your offensiveness, offensive or disgraceful.

Q Offensive or disgraceful; is that correct?

A Yes, sir.

Q That's what prurient interest would mean to you? In other words, let's say, visualize this, Officer Blackwell. Visualize material which contains an attack on elected officials of the State of California, such as the governor, lieutenant governor, and so forth, which attempts to convey a message that these people are really bad by the use of sexual analogues. Now, would that type of material have this prurient appeal to you?

MR. IMHOFF: Object, your Honor; irrelevant; calls for speculation.

THE COURT: Sustained.

MR. McDANIEL: I think you can ask a hypothetical question of an expert witness, your Honor.

THE COURT: The ruling will stand.

BY MR. McDANIEL:

Q Anyway, let's put it this way, then, Officer Blackwell: By your previous testimony, this criterion of prurient interest would come up when you had found that material goes beyond these contemporary customary limits of candor; is that right?

A I'm sorry. Would you repeat it, please?

Q In other words, you'd find this prurient interest after you had found that material goes beyond the customary limits of candor; is that correct?

MR. IMHOFF: Object. That calls for speculation and a conclusion; irrelevant.

THE COURT: Overruled.

You may answer the question.

THE WITNESS: No, sir, if it would be—go to a prurient interest, it would be a shameful or morbid interest; mentally unwholesome.

BY MR. McDANIEL:

Q All right. Then if material is mentally unwholesome, then it would be prurient, according to your definition, right?

A Yes, sir.

Q And in making that determination, do you yourself, in looking at a specific item, determine whether it's wholesome or not wholesome yourself?

A No, sir.

Q Do you ask somebody else whether it's wholesome or unwholesome?

A No, sir. I've tried to feel that I know what the average person, after my background and the survey that I conducted—what the average person would feel.

Q Is unwholesome, right?

A Mentally unwholesome, sir; a shameful or morbid interest.

Q However, you didn't ask questions about that on your survey, though, correct?

A That is—

MR. IMHOFF: Object; asked and answered, your Honor, several times.

THE COURT: Overruled.

You may answer.

THE WITNESS: That is correct.

BY MR. McDANIEL:

Q I see. So you're not really in a position to know what the actual average person of this entire State of California feels is prurient or is not prurient. Isn't that fair to say, sir?

MR. IMHOFF: Object, your Honor; argumentative; calls for conclusion, speculation.

THE COURT: Overruled.

You may answer.

THE WITNESS: I feel that I am, yes, sir.

BY MR. McDANIEL:

Q And you base that on your knowledge of these matters as a police officer and talking with all these

other police officers that you've mentioned; is that right?

A Psychiatrists, yes, sir.

Q But you felt that it wasn't necessary to conduct a random sample survey to determine what people would believe is prurient throughout the entire state. Is that fair to say that, sir, or just that your superiors didn't instruct you to do so?

MR. IMHOFF: Object, your Honor, as irrelevant.

THE COURT: Overruled.

You may answer.

THE WITNESS: Yes, sir.

BY MR. McDANIEL:

Q Now, if a film or a magazine depicts completely naked people with the material in the photographs posed in such a way to emphasize the genital area of the people, would that give you the belief then that that material was prurient?

MR. IMHOFF: Object, your Honor; calls for speculation, conclusion; irrelevant and immaterial.

THE COURT: Overruled.

You may answer.

THE WITNESS: I'm sorry. Would you repeat the question or read it back?

THE COURT: Would you read the question.

(The question was read by the reporter.)

THE WITNESS: Well, this would be hard to picture because I don't know what you mean by—how much emphasis on the genitals.

BY MR. McDANIEL:

Q Well, any emphasis at all.

A A close-up emphasis on the genitals, yes, sir.

Q Now, do you know if there's a difference between an interest in sexuality and a prurient interest in sexuality?

MR. IMHOFF: Object as irrelevant, your Honor.

THE COURT: Overruled.

You may answer.

THE WITNESS: I would say Yes.

BY MR. McDANIEL:

Q What's the difference to you?

A An interest in sexuality and a prurient interest?

Q Yes.

A Well, I believe an interest in sexuality would be from possibly somebody that believes in nudists or nudism, something of this nature, and just generally interested, where a prurient interest would, again, be a shameful or morbid interest in the sexual—the nudity or sexuality.

Q In other words, you don't conceive of the average person having an interest in sex or nudity which would be anything other than a prurient interest. It would be certain specific groups that would have an interest in it that was not prurient; is that correct?

MR. IMHOFF: Object to that, your Honor, as argumentative, irrelevant; calls for conclusion, speculation.

THE COURT: Overruled.

You may answer.

THE WITNESS: Yes, that would be correct.

BY MR. McDANIEL:

Q Now, on this tour, did you go to bookstores and theatres and arcades in San Francisco?

A Yes, sir.

Q And did you see there books, films and magazines portraying sexual intercourse?

MR. IMHOFF: Object as irrelevant.

THE COURT: The objection is overruled.

You may answer.

THE WITNESS: Yes, sir.

BY MR. McDANIEL:

Q And did you go to bookstores, theatres and arcades in San Diego, sir?

A Yes, sir.

Q And did you see there materials depicting sexual intercourse?

A Yes, sir. I saw books. I do not recall any films in San Diego in any arcades.

Q Did you go to bookstores, theatres and arcades in the City of Los Angeles, sir?

A Yes, sir.

Q Did you see there material pictorially depicting sexual intercourse?

A Yes.

MR. IMHOFF: Object, your Honor, as irrelevant and vague. The question calls for conclusions.

THE COURT: Overruled. The answer may stand.
BY MR. McDANIEL:

Q Now, approximately how many bookstores in Los Angeles did you see this type of material?

MR. IMHOFF: Object as irrelevant, your Honor.

THE COURT: Overruled.

You may answer.

THE WITNESS: Adult bookstores, I believe, in Los Angeles would probably have—approximately 75 or so.

THE COURT: The question was, how many did you personally visit.

THE WITNESS: This is not counting on the tour. This is all during the investigation, and so forth?

BY MR. McDANIEL:

Q Right.

A I would have to say probably 50 or so.

Q 50 or so where you saw this sexual intercourse activity depicted, right?

A Yes, sir.

Q And did you go to bookstores, theatres and arcades in the other parts of the Bay area than San Francisco, i.e., Oakland?

A Yes, sir.

Q And did you there see also the sexual intercourse depicted?

A Yes, sir.

Q Do you have any idea how many bookstores and theatres dealing in this type of material there are in the entire Bay area?

MR. IMHOFF: Object, your Honor, as irrelevant.

THE COURT: Sustained.

BY MR. McDANIEL:

Q How many places up in the Bay area did you personally visit, sir?

A I recall four bookstores and arcades, I believe it was, in Oakland; and, I believe, about five or six locations in San Francisco, sir.

Q And, I take it, you don't have any idea of the amount of copies of magazines depicting completely nude people and/or sexual activity there are which are sold every year in this state?

MR. IMHOFF: Object, your Honor, as irrelevant, immaterial.

THE COURT: Sustained.

BY MR. McDANIEL:

Q I take it you've never had any college courses in human psychology; is that correct?

A That is correct, sir.

Q And you don't believe, as you're sitting here, that you're an expert on human behavior, do you?

MR. IMHOFF: Object, your Honor. The witness has not been qualified or attempted to have been qualified. It's an improper question, irrelevant.

MR. McDANIEL: Goes to his testimony on prurience, your Honor.

THE COURT: Overruled.

You may answer.

THE WITNESS: No, sir.

BY MR. McDANIEL:

Q Thank you.

Now, in making your testimony here that—I believe you testified that the materials in question in this case go substantially beyond customary limits of candor in the State of California.

That was your testimony, wasn't it, Officer?

A Yes, sir.

Q Of course, that question, "Does the material here involved in this case go substantially beyond customary limits of candor in this state?"—that question wasn't asked of anybody on this survey, right?

A That is correct.

Q And did you come to that testimony by taking the language of the Penal Code and keeping that in mind while you testified?

A I'm sorry. You lost me.

Q Well, when you testified about this "substantially beyond" business, you made that your testimony because you're familiar with the Penal Code section of our obscenity law in this state which states that to be obscene, among other things, material must, taken as a whole, go substantially beyond customary limits of candor; is that correct?

A That is correct.

Q And so that's the reason that you used that terminology, right?

MR. IMHOFF: Object. That's argumentative, your Honor.

THE COURT: Sustained.

BY MR. McDANIEL:

Q Did you use that terminology because it was in the Penal Code definition?

A The average person does not know what candor means, I believe. That's the reason I used it, yes, sir.

Q Because you never asked anybody whether material showing the nude or the semi-nude goes substantially beyond their standards; isn't that correct?

A No, sir. That is incorrect.

Q You did ask people if material went substantially beyond their standards?

A We asked if it went beyond the contemporary standards; not substantially, no, sir.

Q You didn't use that phrase, did you?

A No, sir.

Q And so, in testifying here before this jury, you stated that the material goes substantially beyond, although you did not have any evidence from your survey which supported such a statement. Isn't that a fair statement, sir?

MR. IMHOFF: Object, your Honor. Argumentative.

THE COURT: Would you read the last question?
(The question was read by the reporter.)

THE COURT: Overruled.
You may answer the question.

THE WITNESS: No, sir. I think the survey covers it.

MR. McDANIEL: Your Honor, may I approach the witness for a moment?

THE COURT: Certainly.

BY MR. McDANIEL:

Q This is your notes from the survey, Officer Blackwell?

A Yes.

MR. McDANIEL: Your Honor, may I have this marked as Defendant's next exhibit in order?

THE COURT: Any objection?

MR. IMHOFF: No objection to it being marked.

THE COURT: Very well. It will be marked Defendant's Q.

BY MR. McDANIEL:

Q Now, Office Blackwell, this document now marked as Defendant's Exhibit Q fairly and accurately depicts the questions that you asked the people on this survey; is that correct?

A That is correct, sir.

Q And nowhere on it is the question, Does material go substantially beyond customary limits of candor shown; is that correct?

A That is correct. It does not say "substantial."

MR. McDANIEL: I offer this into evidence at this time as Defendant's Exhibit Q, for purposes of impeachment, your Honor.

THE COURT: Do you wish to address yourself to the motion?

MR. IMHOFF: Yes, your Honor. I object to the offer of the document into evidence for that purpose.

I would like to argue at the bench.

THE COURT: Well, I'll reserve ruling on the motion and permit argument at the appropriate time for submitting documents into evidence.

You may proceed, gentlemen.

MR. McDANIEL: Thank you, your Honor.

BY MR. McDANIEL:

Q Now, you added this term "substantially beyond" in your testimony here. Because of what reasons, sir? You can detail them if you like.

A Because I feel the material does go substantially beyond. And this is also the wording in the Penal Code.

Q And you feel the material goes substantially beyond for reasons other than your survey, then; is that correct?

MR. IMHOFF: Object again as argumentative, your Honor.

MR. McDANIEL: We have a right to know what his reasons—

THE COURT: Overruled.

You may answer.

THE WITNESS: The survey and the other bases, sir.

BY MR. McDANIEL:

Q And the survey helps you in making that determination because you get from the survey that the people you talk to feel that nude-type material goes beyond the standard, right?

MR. IMHOFF: Object again as argumentative. It's been asked and answered.

THE COURT: Would you read the question, please?

(The question was read by the reporter.)

THE COURT: Overruled.

You may answer.

THE WITNESS: Yes, sir.

BY MR. McDANIEL:

Q Did you then just assume that they would feel it goes substantially beyond?

A I would say Yes, sir.

Q I see.

MR. McDANIEL: I have no further questions.

THE COURT: Anything on redirect?

MR. IMHOFF: Just a few questions, your Honor.

THE COURT: Very well.

REDIRECT EXAMINATION

BY MR. IMHOFF:

Q Officer Blackwell, counsel asked you a few moments ago, in the question that you asked the people on the survey—I believe the question was: Did you ask them the following question: Did you feel that the following activities depicted in a film, magazine or book or other printed material would go beyond the contemporary standards of your community. Number one, semi-nudity, no sexual activity. And I believe you answered Yes; is that correct?

MR. McDANIEL: Objection. That's already been gone over and asked and answered, your Honor.

THE COURT: Sustained.

MR. IMHOFF: This is just preliminary, your Honor, to my next question.

BY MR. IMHOFF:

Q You also asked them if semi-nudity with sexual activity would go beyond their standards?

A Yes, sir, I did.

Q And did the majority of the people feel that it would?

MR. McDANIEL: Your Honor, I would object to that. There's been an offer to introduce into evidence this survey activity. The best evidence rule—it can speak for itself.

THE COURT: I believe we already went into this subject matter. It would be unduly repetitious. The objection will be sustained.

MR. IMHOFF: Your Honor, I only believe counsel went into one question in regard to the survey.

MR. McDANIEL: I would ask that you admonish counsel not to argue objections in front of the jury.

THE COURT: The ruling will stand.

Counsel, you're so admonished.

BY MR. IMHOFF:

Officer Blackwell, I believe you stated that you visited 75, approximately, bookstores in Los Angeles County?

A I believe, approximately 50 or so.

Q That depicted material that defense counsel described.

To your knowledge, how many prosecutions involving this same material are now pending in the City of Los Angeles?

MR. McDANIEL: I'd object to that as incompetent.

THE COURT: Sustained.

MR. IMHOFF: I have no further questions on redirect, your Honor.

MR. McDANIEL: I have one brief question raised by counsel's redirect, your Honor.

RECROSS-EXAMINATION

BY MR. McDANIEL:

Q Then, basically, Officer Blackwell, it's correct, is it not, that you base your testimony that the material is prurient on your own knowledge of this field of prurience from learning this through police officers, psychiatrists, and these other people you talked to; that it's mentally unwholesome, correct?

A Yes, sir.

Q And with regard to the statement that you made that the material in this case goes substantially beyond these customary limits of candor, you base that on your knowledge of the situation in general and not on your survey since it didn't include that specific terminology; is that correct?

A No, sir.

Q Is that incorrect?

A Yes, sir, that is incorrect.

Q You base it on your survey, then, even though the survey didn't ask that question; is that correct?

A A portion of it, yes, sir.

MR. McDANIEL: No further questions.

MR. IMHOFF: I have no further questions at this time.

THE COURT: Officer, in visiting a city, how did you determine which supermarket or supermarkets to visit?

THE WITNESS: We just went to the locations, got a general map of the area, such as San Francisco or something of this nature, and went to the supermarkets and tried to get three different sections of town.

THE COURT: How did you select the three that you would visit?

THE WITNESS: Just myself and the other two officers, we'd just go there. We had no assistance from law enforcement or anything of this nature.

THE COURT: You just selected three?

THE WITNESS: Yes, sir.

THE COURT: What was your purpose in going to different areas of the city?

THE WITNESS: Attempt to get a—not to pick everybody, we might say, in the more wealthy part of

the town, such as Beverly Hills; try to get a fair cross-section. This is the reason we tried to go to the different sections of the town, to try to get a fair cross-section of the—maybe a little lower class, we might say, or the average person.

THE COURT: How did you determine who you would approach to ask questions when you got to the particular market you chose?

THE WITNESS: We'd just stand outside the market entrance; and as the people came in, sir, just at random—

THE COURT: Was there any control as to how many women you would question?

THE WITNESS: We would—if there was a lot of women or the majority would be women, we would not question them, no, sir.

THE COURT: Did you have any predetermined breakdown as to how many men you would question, how many women you would question, what age classification you would question?

THE WITNESS: No, sir.

THE COURT: Was there any predetermined attempt on your part to break down your interrogations by economic strata or economic levels?

THE WITNESS: No, sir.

THE COURT: Was there any predetermined attempt on your part to break down your examination by ethnic classifications?

THE WITNESS: No, sir.

THE COURT: Well, in your actual survey, did you speak to people of all different ethnic backgrounds?

THE WITNESS: Yes, sir. There are some of the locations where, primarily in the Negro neighborhood

or something of this nature, Mexican-American neighborhood—

THE COURT: Was there any attempt on your part to interrogate people from different religious backgrounds?

THE WITNESS: No, sir.

THE COURT: Do you know whether, in fact, you interrogated people of all religious backgrounds?

THE WITNESS: I can only presume that we did, sir. I have no idea.

THE COURT: Was there any predetermined attempt on your part to interrogate people with varying degrees of education?

THE WITNESS: No, sir.

THE COURT: Do you know whether or not you interrogated people of all different strata in that regard?

THE WITNESS: Again, I can only presume, sir.

THE COURT: Anything further, gentlemen?

MR. McDANIEL: Not at this point.

THE COURT: Anything further?

MR. IMHOFF: Nothing further.

MR. McDANIEL: Just one question, your Honor. I'm sorry. Something your Honor raised.

FURTHER RECROSS-EXAMINATION

BY MR. McDANIEL:

Q Tell me what the three locations in Los Angeles were that this survey activity took place at.

MR. IMHOFF: Object to that as irrelevant, your Honor.

THE COURT: Overruled.

You may answer.

THE WITNESS: It was the Safeway in Highland

Park, a location, Wilshire Division—I am not familiar with it. And the third location was downtown Los Angeles, not a supermarket.

BY MR. McDANIEL:

Q In other words, you didn't make any attempt to conduct a survey in South Central Los Angeles; is that correct?

A That is correct, sir.

Q You didn't make an attempt to conduct one in the Harbor area of Los Angeles; is that right?

A That is correct.

Q And you didn't try to make one in the west end of L.A.; is that right?

MR. IMHOFF: Your Honor, I object. It's been asked and answered as to where the—

THE COURT: The objection's overruled.

You may answer.

THE WITNESS: That is correct, sir.

BY MR. McDANIEL:

Q And you didn't make an attempt to conduct one in the San Fernando Valley area either; is that correct?

A That's correct.

Q And you didn't attempt to make one in the South Bay area either; is that correct?

A Yes, sir.

Q You did make one there?

A No, sir. That is correct.

Q As a matter of fact, you didn't make any attempt, in conducting this survey throughout the state, to make your spots represent—I don't know how to phrase this.

I'll rephrase that question.

You didn't make any attempt, nor did your co-work-

ers on this particular activity, to make your survey reflect the population base in the state; is that correct?

MR. IMHOFF: Object to that, your Honor. Calls for speculation. It's vague.

MR. McDANIEL: He offers himself as an expert, your Honor.

THE COURT: The objection will be sustained.

You may rephrase your question.

BY MR. McDANIEL:

Q For instance, Officer, you know, do you not, that the greater Los Angeles area contains some 7,500,000 people? Are you familiar with that?

A No, sir, I am not. If it does, that's fine.

Q Anyway, you didn't make any attempt in this survey to pick locations that might be representative of the actual demographic maps of people throughout the state, did you?

A The 19 counties that were surveyed, roughly, of approximately 85 per cent of the total population of California, sir.

MR. McDANIEL: I'd move to strike that as not responsive, your Honor.

THE COURT: The motion is granted. The answer is ordered stricken.

MR. McDANIEL: Thank you.

BY MR. McDANIEL:

Q In other words, you did not weight your samples from Los Angeles and San Francisco bay areas to represent the fact, if it be a fact, that those two areas constitute some five-sixths of the entire state's population?

MR. IMHOFF: Object. That assumes a fact not in evidence.

THE COURT: Sustained.

THE WITNESS: I believe that question was answered earlier.

BY MR. McDANIEL:

Q All right. In other words, there wasn't an attempt, though, to make your survey points reflective of the masses of population; is that right?

MR. IMHOFF: Object again as argumentative, your Honor, and vague.

THE COURT: I believe this witness testified that they took the same number in each city, irrespective of the disparity of the populations in the cities.

MR. McDANIEL: Fine. I have no other questions.

THE COURT: Is that your testimony?

THE WITNESS: Yes, your Honor. That is correct.

THE COURT: Any further questions of this witness?

MR. McDANIEL: No, your Honor.

MR. IMHOFF: No further questions.

THE COURT: Thank you very much, sir.

Is there any further need for Mr. Blackwell's presence?

MR. IMHOFF: No, your Honor.

May I have a second with him?

THE COURT: Certainly.

This might be an opportune time to have our mid-afternoon recess.

I note an enthusiastic response to the Court's suggestion. Therefore, we'll be in recess—we'll reconvene at 25 after.

You're admonished that you're not to discuss this matter among yourselves nor with anyone else, nor are you to form or express any opinion thereon until the matter is ultimately submitted to you.

Did we stipulate that Mr. Blackwell be excused?

MR. IMHOFF: Yes, he may be excused, your Honor.

THE COURT: Join in the stipulation?

MR. McDANIEL: Yes. I don't care.

THE COURT: Mr. Blackwell, you're excused from further attendance.

Court will be in recess.

(The jurors left the courtroom.)

THE COURT: Are you going to rest now?

MR. IMHOFF: Yes; but for the record—I would like to get into the record what we discussed in chambers before, the stipulation that the film has been shown as a whole.

THE COURT: This better be done in the presence of the jury, so—

MR. IMHOFF: Okay. Then I will probably rest because I don't have any other witnesses at this time.

THE COURT: You're ready to proceed, I take it?

MR. McDANIEL: I have a series of motions after they rest, your Honor, that may take some time.

MR. IMHOFF: Then I will probably have something before defense's case, after his motions.

THE COURT: All right. We'll recess at this time.

(There was held a recess.)

THE COURT: Case of People versus Murray Kaplan.

The record will show that the defendant is represented by counsel, the People are present and represented, the jurors are all seated in their respective places in the jury panel box.

I understand that there is to be a stipulation, gentlemen.

MR. IMHOFF: Yes, your Honor. Defense counsel and I have agreed on a stipulation with regard to the

film; that the entire content of the film has been shown to the Court and jury.

THE COURT: Making reference to People's 3.

MR. McDANIEL: I think that might be People's 5.

MR. IMHOFF: 5, I believe it is.

THE COURT: People's 5.

So stipulated?

MR. McDANIEL: Yes, that's so stipulated.

THE COURT: Ladies and gentlemen of the jury, you are to consider as an established fact that you have seen the entire film identified as People's 5 for identification.

Very well. It's been received, has it not?

MR. IMHOFF: Yes, your Honor, all of my exhibits.

THE COURT: Very well.

Are we ready to proceed, gentlemen?

You rest your case?

MR. IMHOFF: At this point the People rest.

THE COURT: The exhibits have been received, you say?

MR. IMHOFF: Yes, your Honor, all six of them, I believe.

MR. McDANIEL: Yes, your Honor. Now that the People have rested, I have a motion to take up with the Court under 1118, and a related motion also.

THE COURT: Do you think it will take the balance of the working day?

MR. McDANIEL: I don't think so, your Honor. I'm running out of words and arguments, so I don't think it will take longer than a half an hour. Of course, I—perhaps it will. And I don't want to inconvenience the jury. Perhaps it would be better if you excused

them until tomorrow morning. I do not want people waiting around—

THE COURT: You have some preliminary matter to discuss before the defense puts on its case?

MR. IMHOFF: Yes, your Honor. I will have a request of the Court at that time.

THE COURT: Very well.

Then, ladies and gentlemen, we'll use the balance of the day to discuss this business that must be transacted outside the presence of the jury. You'll be excused at this time and ordered to report back to this courtroom at 9:15 a.m. tomorrow morning without further order, notice or subpoena.

In the interim, you are again admonished you are not to discuss this case among yourselves or with anyone else, nor are you to form or express any opinion thereon until the matter is ultimately submitted to you.

(The jurors left the courtroom.)

THE COURT: Very well. You may proceed, Mr. McDaniel.

The record will show that the jury has vacated the courtroom.

MR. McDANIEL: I would request that we do this in chambers, if possible, your Honor.

THE COURT: We might as well, since the courtroom is empty.

(The following proceedings were held in chambers:)

MR. McDANIEL: The first thing that I'd like to have your Honor consider is the offer to introduce that Exhibit Q into evidence which I offered. I think it does—this is a copy of it, my own copy. But it's that survey report. And I had offered it into evidence. You deferred ruling on that. I think that it tends, with the

other material elicited on cross-examination, to impeach this officer's testimony in this case. And I offer it in for that purpose.

THE COURT: Well, as to the top half referring to film, magazines, books and other printed material—I suppose the bottom half which goes to exhibitions in a bar, restaurant or cafe would have no bearing on this particular case. I will consider the upper half.

Do you wish to have an opportunity to argue against the motion?

MR. IMHOFF: Well, you want to argue it now?

THE COURT: Yes.

What would be, technically, your—

You would be introducing your evidence at the time you close your case.

Do you have any objection to it being argued at this time?

MR. IMHOFF: No, not at all.

THE COURT: All right.

MR. IMHOFF: I just want to point out the word substantially, as counsel was pointing out in cross-examination, goes to customary limits of candor, substantially beyond customary limits of candor. And that was not the question that was asked there. The question asked there is in regard to contemporary community standards. And the word "substantially" does not appear in the Code in regard to—in direct relation to that particular test of contemporary community standards.

So, I mean, for impeachment purposes, I feel that the—you know, that the evidence is objectionable for that purpose because that's not the test. I mean, the word "substantially" does not necessarily fit in that part of the question. I mean, that part of the question is correct as far as the test in the Code is concerned.

THE COURT: He does say that at least in part he has based his answers on this particular survey. He was examined, and he gave specific answers as to why "substantial" was put in there and that he arrived at his opinion with regard to the substantiality beyond which this goes, beyond contemporary standards, from his total background and experience.

The question of argumentation at the time that you present your argument or your rebuttal—well, it does seem that this particular survey is a substantial portion of his expertise.

The exhibit will be—the upper half of the exhibit—we'll have to cut the bottom off because it doesn't apply—will be received bearing the designation of Defendant's Q.

All right. What's your next point?

MR. McDANIEL: Next I'm going to ask your Honor to consider at this time a motion under 1118.1 of the Penal Code. The People have rested their case. And with regard to that motion, I think there are several significant facts to be brought out at this time.

First of all, I think your Honor can consider, for purposes of this motion, your own view of the material involved in the case and your own view of the material which has been offered by me preliminarily, anyway, although that material was not accepted to be used for impeachment purposes. But the basic reason for an 1118.1 motion is to have the Court really, in effect, toss the case out if there either has been a failure to prove the case or if the clear fact is that a conviction would be reversed on appeal. And I'll take a look at the Penal Code for just a second to clarify exactly what that section's talking about.

Yes. The Court shall order the entry of a judgment

of acquittal under this motion if the evidence then before the Court is insufficient to sustain a conviction of such offense or offenses on appeal.

Now, there's a couple of factors here. First of all, I'd like your Honor to consider, in the light of this motion, also a motion to strike the entire testimony of Officer Blackwell on his opinion testimony, on the following bases, and to consider this in the light of my motion also.

First of all, he has, by his own admission, come up with testimony that this material has an appeal to the prurient interest based not on expert knowledge of statewide opinion in this state at all. He's admitted that his testimony on prurience is not based on his survey, which I'll get into in a moment. I don't think it's an accurate representation of state-wide opinion either.

But going just to the—first the prurient testimony is based, as I understand it, on his experience as a police officer, talking with other people and, he said, talking with a group of other people which were never identified as to locale, what the discussions were or anything else. And he has the view expressed in his sworn testimony that a prurient appeal merely means wherever material is mentally unwholesome. Plus, he's admitted he's not an expert in behavioral science or human psychology.

I would submit that he's just giving his own police officer testimony. It's not expert testimony as we know is required by the Giannini opinion. And the Giannini opinion is quite specific that the state, to support its burden, must establish that the material in question goes substantially beyond customary limits of candor to the average person in the entire state, and that the

material has an appeal to the prurient interest of the average person tested by the entire state.

Now, this testimony on prurience does not meet that requirement of Giannini, and in a realistic sense does not supply expert opinion regarding prurience in any fashion to the trier of fact. It's just his own viewpoint, I think, after you isolate out the other factors that weren't involved in it. Both things are absolutely required under our state law of obscenity, *a la* Giannini; and there's just been a failure on the prurient part.

I think, coupled with that, is the, what I consider, very strong question as to the vitality, if you will, of his testimony, on customary limits of candor, *et cetera*, where he admits that at no time did he ask anybody if this or any other material goes substantially—he could have said, for instance, substantially beyond their standards. He said that he didn't think people know what candor means. I don't think that that kind of pocket judgment is enough to authenticate a survey which doesn't go into the questions required by our state law.

And I think that this survey—you can consider yourself in analyzing what his testimony was—does not supply him with a basis of state-wide expertise. And I don't think that those gaps in either of those two points can be filled in by his experience as a police officer.

I think that it goes without saying that the purpose of those requirements is to make sure that we do have an objective perimeter in these rather excruciatingly difficult judgment areas. And I don't think that the People have supported their burden whatsoever on those two points.

So that I think, if you take that in consideration, considering his complete testimony and the material itself, which I would, of course, be sure you would realize if you were to look at these litigated materials

—but I don't really think it's necessary. It's not material that a conviction would be sustained upon an appeal in this case. So I know that it's just within the standards of material that's already been litigated and found not obscene both by appellate departments and courts all the way up to the United States Supreme Court.

Couple that with the, I think, serious question about the efficacy of his testimony under the requirements of Giannini, because I don't think he's established himself as a "state-wide expert" at all on either of these points—I think a motion under 1118.1 is proper at this time. And so that's basically the way I see it, your Honor.

THE COURT: Do you wish to address yourself to the motion?

MR. IMHOFF: Yes.

I think counsel makes a statement it would not be sustained on appeal. This is really speculation on his part. I think there's a real issue here for the jury to decide, whether or not this material is or is not in fact obscene. The material counsel has offered before for purposes of impeachment is not in evidence, and the Court cannot make any kind of comparison at this time to that material.

I think the People have established the elements of their case; it was sold knowingly, and that the material itself is obscene. We're talking about a state-wide standard of community standards, and I think Officer Blackwell's survey qualifies him to talk about the community standards of the state. I mean, he's much better qualified than the average layman to get up and talk about what the average person in the State of California feels about their community standards.

As far as prurient appeal is concerned, Officer Blackwell did not base his opinion on prurient appeal merely on his personal opinion. He's made it very clear that he considers prurient appeal a shameful, morbid interest in nudity, sex or excretion, and that this is based on his experience as a police officer, the many thousands of complaints he's investigated, the many thousands of cases he has worked on, the many conversations he's had with people throughout the state, and not only prosecutors and psychologists but also people in the business, people in the bookstore business and in the bar business, people who deal in this kind of entertainment or sale. I don't think we're—prurient appeal is exactly the same thing here as contemporary community standards. I think they're two different elements and two different matters. I think you need a state-wide dimension for contemporary community standards; but a prurient appeal, I don't believe, is—falls in the same bag as contemporary community standards does. And I think his testimony certainly is, with his broad background of experience—qualifies him to recognize what appeals to a prurient interest.

And he said it's not his personal opinion. It's what he felt that the average person would feel would appeal to a prurient interest. It's not based on his personal opinion.

MR. McDANIEL: Could I respond briefly, your Honor? First of all, counsel is proposing a different rule than what was set down by the State Supreme Court. I'd be interested in hearing about that, because the Giannini case itself explicitly states that there must be state-wide evidence—expert evidence of state-wide standard both on the question of prurient appeal and on the question of customary limits of candor. And

here's the case right here, I'd like to add, for purposes of your contemplation of this motion, your Honor, that you seriously consider the effect of the explicit holding in Zeitlin against Arnebergh, a case that I know your Honor is familiar with. That's 59 Cal. 2d 901, wherein it is held that the state Penal Code statute here, obscenity statute, is limited in its effect to convictions or to findings of obscenity on only hard-core pornography and nothing else.

And I'll offer the Zeitlin against Arnebergh opinion to support that proposition, too. I think that it's fair to say that we do not have hard-core pornography in this case, and so I won't ask you to interrupt looking at Giannini to look at that.

But Giannini quite clearly requires expert testimony on the part of the prosecution on both the state-wide prurience and state-wide contemporary standards or customary limits of candor. It's not that they don't in one. As a matter of fact, they require it in both. I don't think counsel would disagree with me on that.

THE COURT: Well, the testimony, insofar as the background upon which Officer Blackwell achieved his expertise, indicates that he relied on this survey, that he's discussed the matter with law enforcement agencies and prosecution agencies, private individuals, bookstore people, various reading materials, et cetera.

MR. McDANIEL: Of course, remember—

THE COURT: Whether or not his sample was as scientific as it should be goes to the question of weight. It appears there was an attempt to make a state-wide sample.

MR. McDANIEL: But not on prurience.

THE COURT: I believe that he indicated that he based his opinion as to prurience on the same criteria.

MR. McDANIEL: Well, your Honor, he didn't say anything about prurience going to any kind of state-wide stuff. That was just local stuff really. I mean that's—search the testimony and you won't find it. And I think that you consider kind of a hard judgment here. I don't think there's been a showing of competent proof on prurience particularly. I don't think there's a competent showing on substantially beyond customary limits of candor. Both of those are absolutely required by Giannini.

Couple that with the requirement that it be hard-core pornography only, and I think you can just about take judicial notice that the material in this case is not hard-core pornography, whatever it might be. I think that it's—a motion which properly lies at this time, your Honor—

THE COURT: Yes, the motion lies at this time. There's no question there.

MR. McDANIEL: Then I think it properly should be granted.

THE COURT: Of course, here the fact finder is the jury.

As I understand, the test under the motion provided under 1118.1 is whether or not there's been a showing wherein all the elements are presented so that the fact finder may make a judgment evaluation as to whether or not it's convincing or not, a ruling on that point.

MR. McDANIEL: Well, of course, it's more than that, though. It's whether a conviction would be sustained on appeal on the basis of this evidence. That's written right into the language of the section

THE COURT: Well, I think there has been a sufficient showing in the People's case. Your argument

basically goes to the weight and not to the admissibility.

The motion under 1118.1 of the Penal Code is denied.

MR. McDANIEL: And, I take it, the motion to strike his testimony is denied also?

THE COURT: The motion to strike his testimony is denied also.

MR. McDANIEL: All right. I will ask your Honor to take judicial notice at this time of the matters previously discussed in that regard. That was Exhibit B and Exhibit C. I'll ask you to take judicial notice of the fact that Exhibit J, the book Adam and Eve found not obscene in Hoyt against Minnesota by the Supreme Court, was found not obscene by the Supreme Court also. And I'll ask you to take judicial notice of the fact that the materials here identified as Exhibits D and E—that's The Foxes and Fantastic, were found not obscene in a final determination in the case of People against Church and Lewis, Beverly Hills Judicial District, No. M-219—

THE COURT: What is that, E and G?

MR. McDANIEL: D and E, your Honor.

And I'd like to make this statement again as an offer of this court, or I'm willing to be sworn to testify to it; that I was the attorney that handled that particular matter. And in that particular case the determination that they were not obscene was made by the judge there, Judge Wolf, on the basis that the materials were within customary limits of candor and for no other reason. And, as I say, I am willing to testify to that fact. I was present through the whole proceeding, and that was the basis of his determination. It's a final opinion.

And, again, they're quite comparable with the material charged. So are the other ones that I've mentioned.

THE COURT: F and G, where were they found to be—

MR. McDANIEL: F and G are in the cases I've mentioned previously, Graham and Snavely and Paulitch and Luros, two obscenity prosecutions in the South Bay Judicial District, County of Los Angeles, where the charges that they were obscene were dismissed upon the motion of the prosecution on the basis that the People were unable—could not prove that these magazines were obscene. So they were therefore dismissed. And that's, again, a final determination in that case, too. None of these cases I've mentioned is on appeal any place. They're terminal adjudications of one type or another. Those are Exhibits F and G, a magazine called Lezo and a magazine called Jaybird Experiences No. 9.

THE COURT: G was in the Luros case, and F was in the Graham and Snavely case?

MR. McDANIEL: I believe that's correct, your Honor. And I, again, was the attorney who handled those matters as well.

THE COURT: South Bay Judicial District.

MR. McDANIEL: And I represent to this Court that the representations I'm making I make as an officer of the court from actual personal knowledge, having been involved in the cases.

MR. IMHOFF: I would object to the Court taking judicial notice at this time, your Honor. What I was going to ask, after counsel had made his motions, was to have a hearing on each and every one of these items before counsel makes his opening statement, proceeds with his case to the jury, for the simple reason

that they may or may not be admissible, and it could have a prejudicial effect on the case. These cases that are involving Municipal Courts of equal jurisdiction are not binding on this Court, for one thing. And I would want to read those opinions to find out whether the people were found not guilty and what reason, if any—if there was a determination of nonobscenity, why there were found nonobscene.

THE COURT: I think that's fair enough. I'll withhold ruling.

Insofar as Bloss versus Dykema, Defendant's C, do you have—do you wish to address yourself to that?

MR. IMHOFF: I looked for Bloss versus Dykema. Are you sure you gave us the right citation on that, Counsel? I wasn't able to find it. We don't have that particular—I was looking for it over the lunch hour. I know I've read Bloss versus Dykema. That was a 1970—

MR. McDANIEL: Yes.

MR. IMHOFF: —decision.

That involves the magazine Jaybird; is that correct?

MR. McDANIEL: Yes.

MR. IMHOFF: I would ask the Court again to reserve its ruling until—

THE COURT: You want to look it over before you respond?

MR. IMHOFF: Yes, I'd like to look that case over before I respond and—

THE COURT: I'll withhold ruling until tomorrow morning, give you a chance to look that over.

All right. We'll recess until tomorrow on this, and we'll reconvene at 9:00 a.m.

(Recess.)

LOS ANGELES, CALIFORNIA,
TUESDAY, JANUARY 26, 1971
9:30 A.M.

(The following proceedings were held in chambers:)

THE COURT: The record will show that a certified copy of the minute order from the Beverly Hills Judicial District, with regard to case No. M-21982, which makes reference to—

Defendant's D, is it?

MR. McDANIEL: And E.

THE COURT: Were both of these cases consolidated?

MR. McDANIEL: Well, it was just one case. Actually, both magazines were involved in the same case, two defendants.

THE COURT: All right. And there must have been a joinder somewhere.

MR. McDANIEL: I think, your Honor, that it started out just as one case against the two. I think one guy may have been the owner of the store and the other guy the clerk.

THE COURT: It does say—yes. Lee Doe, who turns out to be Lee Church, and Peter A. Lewis. These are Municipal Court Nos. 519765MC—that's the Church case—and 519766. That's the Lewis case.

On the last page under date of August 20th is the following entry: "Court finds the subject matter material not to be obscene within the meaning of Section 311.2 of the Penal Code and is constitutionally protected."

All right. You may address yourself to the motion.

MR. IMHOFF: First of all, your Honor, the only issue that this material would be relevant to at all

would be contemporary community standards, if it were comparable.

First of all, what happens in another Municipal Court is not binding, in the first place, on this Court. It is really no authority. There's no authority for admitting any material such as this. A finding of nonobscenity, even if it were made, is far too vague for the issue of contemporary community standards. There are no specific findings as to why it was considered constitutionally protected. So you can only offer this evidence, if it were admissible at all, on that issue of contemporary community standards. And a finding of non-obscenity is far too vague for that issue because you have three elements of obscenity; prurient appeal, contemporary community standards, and redeeming social importance. And there's no way of telling why the Court found something to be constitutionally protected or not obscene. It could very well go beyond contemporary community standards and have prurient appeal, and the Court may have felt it had redeeming social importance, or it could have been one of the other elements.

So the evidence is not admissible at all on this issue, as far as I'm concerned. And, to my knowledge, none of this kind of material has ever been admitted in any cases around here that I've tried or anyone else.

Just last week in Judge Grillo's court, most of this kind of material—all of it, in fact, was held nonadmissible because it was not relevant. Even if the material were comparable, which it isn't, you can't go on the authority of a Municipal Court. The People could have appealed that but they did not, apparently. Another Municipal Court somewhere else may find in the same thing probable cause to believe that the material is ob-

scene and hold them over for trial. There's just no basis for the admissibility of this evidence.

MR. McDANIEL: Your Honor, first of all, just going to some of those comments, where material has been litigated and found to be not obscene in a terminal decision, an objection that that's a court that's not binding would go to the weight of such evidence. It's merely one part in the mosaic of elements that tends to show what the standards are. A finding of nonobscenity does indeed set an objective standard. It sets part of an objective standard.

And, specifically in this particular case, the findings were based on customary limits of candor and nothing else.

Now, as I say, I handled the entire case, and I'm going to testify to that effect, since there seems to be some query on that. I'd like to be sworn to testify right now, if I may.

THE COURT: Well, the Court will permit Defendant's D and Defendant's E. The question of comparability will be one for the jury, and they will be so instructed. The question of the fact that it is not binding on this jurisdiction, that it can be persuasive but not binding, will be included in the instructions.

So far as Bloss versus Dykema—that's Defendant's C—wait a minute. Let's see.

Defendant's B was what? That's the one—

MR. McDANIEL: B is the Bonanza magazine.

THE COURT: That was the Bonanza magazine. The Court will permit Defendant's B to be shown to the jury.

Defendant's C—and the Court will take judicial notice of the ruling of the Appellate Department of the Superior Court on that finding and will so note in its

instructions to the jury, and will preadvise the jury as the item is shown, if you'll remind the Court. Defendant's C, the same thing. That's the Bloss versus Dykema case.

Defendant's D and E will be admissible.

Defendant's F and G, we have the actual certified copy of the minute orders of the Beverly Hills Judicial District. They have arrived and are in the Court's possession at the present time.

As to—

MR. IMHOFF: What are F and G?

THE COURT: Graham and Snayely.

Now, we have a South Bay Judicial—the actual minute order is still in the mail. I guess it will come in this afternoon's mail, I hope. But the clerk has, by telephone, copied down the information given by the clerk of the South Bay Judicial District. And this refers to Municipal Court No. 93185, and it's M-93185 and M-93350.

The entries are as follows: On November 7, 1969—and this is a unique situation, as far as I'm concerned. This indicates motion by People to dismiss, motion by defense to dismiss; motions denied. All right. December 12, 1969, cause again argued, demurrer overruled, motion to dismiss again denied, set for jury trial December 18, 1969. On December 18, 1969, continued to March 16, 1969. On March 16, 1969, on motion of the defense complaint dismissed for lack of prosecution.

Therefore, there appears to be no finding as to the acceptability or lack thereof or there is no finding on the merits of the case. As a consequence, Defendant's F and G will be rejected.

MR. IMHOFF: Were those magazines?

MR. McDANIEL: Those are two magazines.

THE COURT: That's the Luros case and Graham and Snively. So they will be rejected.

Defendant's A is rejected. That's Playboy.

MR. McDANIEL: Now, that brings us up to the question for comparability purposes—

THE COURT: Just a moment.

Defendant's F and G will be rejected. H and I are rejected.

MR. McDANIEL: May I discuss that point briefly?

THE COURT: Go ahead.

MR. IMHOFF: May I ask which are H and I, first?

MR. McDANIEL: Those are purchased magazines.

THE COURT: Well, the fact that they've been purchased—the fact that somebody's selling them is not any stamp of imprimatur or inductive as to their acceptability or their legality.

MR. McDANIEL: I think it shows some evidence of the standard, perhaps not as much as the litigated material but—

THE COURT: The ruling will stand.

Now, as to J—

MR. McDANIEL: That's the Hoyt book.

THE COURT: We have to get those cases. We have to get 90 Supreme Court which is not in the library at the present time.

MR. IMHOFF: J applies to the Hoyt case, and— which one applies to Bloss?

THE COURT: Bloss is C.

MR. IMHOFF: All right. I have some comments about those when—

THE COURT: All right. You can make your com-

ments as to Bloss versus Dykema, and what other one?

MR. IMHOFF: I thought you wanted to wait until you got the case, but—

THE COURT: No. Bloss versus Dykema—we saw that. Somebody showed me—didn't I have that volume earlier in this case, or was it another case? Bloss versus Dykema was a direct conclusion by the Supreme Court as to acceptability, as I recall.

MR. McDANIEL: Yes. So was Hoyt.

MR. IMHOFF: Well, these were reversals based on Redrup. And, as you recall, the Redrup decision doesn't set any standards. All the Redrup decision said, as we discussed before, was that some judges feel this way about it, some judges feel that way about it, and some judges feel that way. But the material in Redrup didn't meet any of the tests that they were considering, and so, therefore, they reversed. And they reversed these cases under Redrup but they've made no specific findings as to contemporary community standards, and that's the only relevance that these materials would have.

THE COURT: All right. I will withhold ruling on that until I see the volume.

MR. McDANIEL: Let me address myself to that, your Honor. There was a specific clear-cut finding of nonobscenity with regard to the Hoyt material and the Bloss material.

THE COURT: If there is such a finding, the Court will—as I say, my memory somewhere jars that in Bloss that was the case. I don't know about Hoyt. And the other case, what was that?

MR. McDANIEL: That was—well, Hoyt was the other one that we were talking about. Bloss you've seen.

THE COURT: All right. Now, Defendant's K, which is the Presidential Commission Report—

MR. McDANIEL: I'm going to use that in a different way, your Honor. I have a witness who is a member of the Advisory Staff to the Commission, and I will be bringing it in through his testimony.

THE COURT: Well, I'll tell you this in advance. I'm not going to permit testimony in the guise of expert testimony to argue that the law should be changed. That's not the province here. He will qualify as an expert who can testify to state-wide contemporary standards, and that's it.

MR. McDANIEL: Well, I think he can testify as to some pertinent facts that he's worked on with this Commission, research.

THE COURT: All right, as it applies to contemporary standards in the State of California. Of course, that would be admissible. But insofar as bringing in subject matter to argue for change of law, that will not be admissible, irrespective of what the Court's personal feelings are in the matter. That's not the province of this Court.

MR. IMHOFF: I would object to any testimony on the Presidential Commission, your Honor. It's irrelevant to issues of contemporary community standards in the State of California. It's merely an advisory report of the President of the United States; has no relevance. It's hearsay.

THE COURT: All right. Well, we'll cross that bridge when we come to it.

MR. McDANIEL: Let's go on to L and M.

THE COURT: L, M, N and O were withdrawn at the first argument.

MR. McDANIEL: Now I'm going to offer L and M in at this time. L and M, your Honor, were—

THE COURT: Now, these prerulings are for the benefit of you knowing what the Court's attitude is in framing your opening argument.

MR. McDANIEL: Right. I won't try to get involved in—

THE COURT: Your opening statement, I should say.

MR. McDANIEL: I'm just referring to L and M now. That's Sex Orgies Illustrated and Africa's Black Sexual Power. L is Sex Orgies Illustrated, and M is Africa's Black Sexual Power.

Now, these two publications were found not obscene in a decision by Judge Landis, final decision, with a memorandum opinion which I will hand up to the Court. And, interestingly enough, they were found not obscene on the same date that the purchase of the materials in this case occurred which was May 14, 1969. And there is one other book that is discussed in this decision which I haven't offered and isn't involved. Actually, the judge in this ruling found that this other book was obscene. And I don't know what happened to it after that. I guess it went through a trial or something. But I don't have any information on it and I haven't offered it.

So here's the memorandum opinion.

MR. IMHOFF: May I ask which court that was?

MR. McDANIEL: Los Cerritos Municipal Court. That's Los Angeles County.

THE COURT: It doesn't say what the name of the book is, unfortunately.

MR. McDANIEL: Yes, it does. Go on to the next page. It's got it at the top of it, Sex Orgies Illustrated.

THE COURT: All right.

MR. McDANIEL: Now, you can strike this entire part here, go on to the next page. That's where the next publication comes up, right here.

MR. IMHOFF: Well, your Honor, again, there has been no finding as to contemporary community standards in either one of these, and they're certainly not comparable material. We have a case of a book—

THE COURT: I'll hear your argument as to comparability, because it does appear that from—I haven't read the book. But it does appear that they're talking about fine art, in that these drawings are by famous artists, such as Hogarth, DaVinci, Rembrandt and Picasso. All are fairly described.

What about the comparability?

MR. McDANIEL: The comparability is this, Judge: Basically, you have a charge under 311.2 which is a claim of obscenity. And these two publications in this particular case, the L and M exhibits here, were charged with obscenity. They graphically depict a whole series of sexual relationships in full detail and yet were found not obscene because they're not hardcore pornography. And the test of comparability really is not that you have to have the identical publication. Obviously, that could never be. But where you have materials that were charged with obscenity, litigated on this issue and determined not to be obscene and containing pictorial representations, I feel that that shows that they're comparable materials.

Now, it may be that the weight of those could be argued in argument by the prosecutor. I don't know. But it seems to me that they are indeed comparable exhibits.

MR. IMHOFF: I think what they're talking about in that opinion is redeeming social importance more

than anything else. They don't specify why, and that's one of my major objections to the material. But they're certainly not comparable to the book that we have here. I'd have to read them anyway to decide, and I think the Court would have to read them to decide whether or not they are comparable material before the Court could make a ruling as to whether or not they should be admitted.

THE COURT: Well, if you're submitting them to the jury for a comparison as to People's 2 which is the book—

What was the name of that book?

MR. McDANIEL: Yum-Yum Magazine.

THE COURT: No. Suite 69.

MR. McDANIEL: No. I'm not submitting it as comparable to that. That's what the other—the Hoyt book is for that purpose. Because they're both basically pictorial, I'm submitting them as comparable to the pictorial subject matter of this lawsuit.

MR. IMHOFF: That would be way out of line, your Honor. I assume that those magazines that have been offered are going to be offered as comparable to the magazine. That's the only thing they would be comparable to. You can't compare written material with a few illustrations in it to a magazine with all illustrations. You're not taking the thing as a whole in that particular case. There's certainly no comparability—

THE COURT: The Court is possibly stretching the point. I could find a distinction between the magazines depicting nude females posed for purposes of displaying their genitalia as opposed to the subject matter before the Court which is pictures of men and women so depicted in the photographs. It might—it ap-

pears to be close enough so that perhaps a comparison can be made.

MR. McDANIEL: This thing has mostly pictures in it, Judge. Sure, there's some text in it but it's basically a picture book.

MR. IMHOFF: We're talking about art pictures mostly in there, I would say. You can't take them out of context. The book was found not obscene by the court. But you can't take the pictures out of context. They took the book as a whole. And you can't take the pictures out of context and say they were found not obscene and, therefore, you can compare them to the pictures in the magazine. The pictures by themselves may very well have been found obscene by a court; but they didn't consider the pictures by themselves in a finding of nonobscenity on the book.

MR. McDANIEL: By the way, Counsel, it is stipulated, is it not, that I can remove all these exhibits at the close of the trial?

MR. IMHOFF: Oh, sure; stipulate to that.

THE COURT: I think that, as far as L is concerned, by reason of the lack of comparability, I'm going to reject L.

MR. IMHOFF: May I say, in regard to that stipulation just now about removing these, if defendant is found guilty, I would not stipulate because I would assume defendant would appeal the case and—

MR. McDANIEL: Well, I would make them available at the time of appeal, but I would need to still remove them because I have to use them in other places.

THE COURT: That can always be accomplished by incorporating—

MR. McDANIEL: My problem, Judge, is that I

don't just handle cases in the L.A. City court but all over the place.

THE COURT: I understand.

Now, M, the book on—

MR. McDANIEL: Take a look at the pictures in that, please.

THE COURT: Yes, I saw the pictures.

MR. IMHOFF: Is this being offered as comparable material to the magazine or the book?

MR. McDANIEL: To the magazine.

MR. IMHOFF: Again, I would voice the same objections, your Honor. There's no comparison whatever to the magazine.

MR. McDANIEL: It's pictorial, men and women.

THE COURT: The pictures are not quite as graphic, and we do have—

MR. McDANIEL: I think they're more graphic. They show actual intercourse in there, your Honor.

THE COURT: Well, you can't tell for certain.

MR. McDANIEL: You can in a couple of them. There's a couple of them where it shows insertion.

MR. IMHOFF: We don't have photographs. Aren't those—

MR. McDANIEL: Those are photos.

MR. IMHOFF: Again, your Honor, you can't lift them out of context and compare them to the magazine because the test is judging material as a whole. And the Court judged that book as a whole, including—just like the same situation with Playboy. You can't take them out of context and use them as comparable material to the magazine.

THE COURT: Well, I don't see any actual insertions.

MR. McDANIEL: Let me show you that. Here's one of them right here.

IN THE
Supreme Court of the United States

October Term, 1972
No. 71-1422

MURRAY KAPLAN,

Petitioner,

vs.

CALIFORNIA.

**On Writ of Certiorari to the Appellate Department of the
Superior Court of the State of California, County of Los
Angeles.**

APPENDIX.

Volume II (pages 241 to 483)

THE COURT: I don't know that that's—that doesn't look like an insertion. It might be a touching, but you can't even tell for sure whether that's the situation.

MR. McDANIEL: I think it is fair to say that there's nothing in this magazine that's charged here that shows anything like these pictures do.

Here's another one that is kind of inescapable.

THE COURT: It's still—could possibly be. It's not that clear.

MR. McDANIEL: Here's another one here.

THE COURT: No. That definitely is not.

MR. McDANIEL: I'm going to flip some pages. I'll ask you just to look at these pages that I've flipped. There's about four dog ears in there that I think present more than probable cause to suspect there's insertion.

THE COURT: It's suggested. You can't tell on the first one. It doesn't have to be but it could be.

This, on page 70, is obviously retouched and you can't tell.

MR. McDANIEL: Well, I might say that the person that put this magazine out or this book out is not one of my clients, so I can't be responsible for his poor quality of photographs.

THE COURT: Well, you have photographs but you have text. And this appears to be a manual on love-making in Africa, and an allegedly scientific and/or scholastic type.

MR. IMHOFF: Your Honor, the pictures were not found obscene. The whole book was found not obscene.

THE COURT: All right. M will be rejected as not being sufficiently comparable as L.

MR. McDANIEL: Okay. Let's go on to—

THE COURT: N and O.

MR. McDANIEL: Well, forget those. I'm not going to talk about those right now.

THE COURT: Are you withdrawing them—

MR. McDANIEL: Well, I'll offer them subsequently, but I want to talk about a couple of other things. I want to introduce motion picture film now. And Exhibit P is three reels of film which were specifically found not obscene in the case of People versus Cine 73, Incorporated.

THE COURT: Three reels of film, Cine 73.

MR. McDANIEL: Well, Cine 73 and Stanley Hurst Smith, Case No. M-94458, Municipal Court of Pasadena Judicial District, County of Los Angeles, Honorable Daniel L. Fletcher, Judge, Division 3 of that court.

THE COURT: All right.

Could you call that court for a copy of their minute order and get the information?

MR. McDANIEL: Your Honor, I have—

THE COURT: You have a copy of—

MR. McDANIEL: Yes. Let me just read something first. This is a partial transcript of proceedings at the time of the verdict. And I'll just read briefly:

"THE COURT: The record will show that the jury is present in the case of People versus Cine 73 and Stanley Hurst Smith. Mr. Smith is not here, is represented by Attorney David Brown.

"Mr. LePage, I understand that you have reached a verdict.

"THE FOREMAN: Yes, we have.

"THE COURT: Would you please hand the verdict to the bailiff, please.

"I have one verdict here. The verdict concerns Cine 73 and Stanley Hurst Smith.

"Is this the verdict as to both of the defendants?

"THE FOREMAN: Yes, sir. As I understood your instructions, we were to pass on whether the film was obscene or not. This is the verdict that you have in front of you, your Honor."

Then it goes on to read off that they find not guilty—the important part is this statement on the record: "... we were to pass on whether the film was obscene or not. This is the verdict that you have in front of you, your Honor."

THE COURT: I'll reserve ruling on either the significance of the finding and the film itself until we've seen the film.

MR. IMHOFF: What about counsel's opening statement? This may not be admissible.

MR. McDANIEL: Well, your Honor, it was found not obscene, and I think that this shows that I could get Judge Fletcher on the phone who would validate that finding. I think that would resolve the problem.

MR. IMHOFF: We have a finding of not guilty in that case. They also probably passed on whether it was exhibited or sold or whether or not he had knowledge. They had to decide those issues, too.

MR. McDANIEL:

"THE FOREMAN: As I understood, we were to pass on whether the film was obscene or not.

This is the verdict that you have in front of you."

It couldn't be more clear.

MR. IMHOFF: We don't know what the jury decided when they were in the jury room.

THE COURT: Again, I'll reserve ruling.

You may indicate that you will submit some material that will be submitted to them for determination

of comparability. You can argue perhaps that they are comparable.

MR. McDANIEL: They are. I guarantee it.

THE COURT: They will be admonished as to the nature of an opening statement.

MR. McDANIEL: I'll ask to have this one also marked as Exhibit R at this time. This film can here to be marked as Exhibit R is the film Quiet Days in Clichy. This film was found not obscene in the following case: U. S. versus 10 Reels Motion Picture Film Entitled Quiet Days in Clichy, Grove Press, Incorporated, claimant, U.S. District Court No. 70-1116-WPG.

Findings of fact and conclusions of law—Judge Gray, without a jury, made the findings of fact and conclusions of law.

I'll show your Honor the findings of fact and conclusions of law at this time. However, the specific finding was nonobscenity. The government was unable to prove that it went substantially beyond customary limits of candor; and that's mentioned in there also. And I might add that I have shown this film in several other cases.

THE COURT: All right. I'll have to handle this the same way as the other. I'll reserve ruling on all aspects until I've seen the film.

Now, tell me, are any of these—these films that you're offering, both P and R, are they fully developed plots or is it just a showing of preforncation sex play?

MR. McDANIEL: The P is just a showing of preforncation sex play throughout. There's no plot; you might say, little plotlets. It's really a sequence of a whole series of little—

THE COURT: Is there sound?

MR. McDANIEL: No, there isn't any sound to that one.

THE COURT: All right. Now, with regard to R—

MR. McDANIEL: R is a plotted film that has a sound track. And, basically, the story line isn't well developed, but it concerns a couple of young ne'er-dowells fornicating their way through Europe in glaring detail with a lot of four-letters words, and so forth, plus pretty clear-cut showings of sexual intercourse and a great deal of nudity and sex throughout the film. I might add—well, I won't add anything else to that.

THE COURT: All right. Well, I'll have to look at those. I won't give you a ruling.

MR. McDANIEL: Now, the only other question I wanted to ask your Honor is, would it be permissible for me to merely read to the jury excerpts from the book that I intend to offer, Adam and Eve, from Hoyt? I don't want to take the jury's time to read the whole thing. I will, if you think that's necessary.

THE COURT: I guess we'll have to give it the same treatment as we gave the People.

MR. IMHOFF: You haven't ruled on J and G. Those were Hoyt versus Minnesota and Bloss versus Dykema.

THE COURT: Yes. We have to get the—the hard-bound volume is not available, so—

Now, J is—

MR. McDANIEL: Hoyt against Minnesota.

"The petition for a writ is granted and the judgment is reversed," citing Redrup. They were found obscene below. And this reversed that, and they were found not obscene.

MR. IMHOFF. They reversed, but we don't have any idea why they reversed.

MR. McDANIEL: Well, they only reversed on the issue of whether or not the stuff's obscene. That's what it means when you have—

THE COURT: Well, they say the six justices of the Minnesota Supreme Court indicated it was obscene for purposes of obscenity itself. Now, they may say that it's—

It's ambiguous. And, as a consequence, I can't say that there's a clear-cut finding.

MR. McDANIEL: Well, your Honor, I can prove that there is because that's very significant to me, that particular exhibit. And the whole situation when you have a Redrup reversal is that you have a percuriam finding of reversal citing Redrup. Redrup stands for the proposition that the material underlying is not constitutionally obscene. I think if you got 386 U.S. 767 or 87 Supreme Court 1414, that would perhaps supply the missing link here. That's the Redrup case.

THE COURT: 87 Supreme Court?

MR. McDANIEL: 1414.

THE COURT: All right. I'll reserve ruling, then, on that.

MR. McDANIEL: I'd like to, you know, get that tied down because I can prove in another fashion if I have to. It will take a few more minutes, but I'll have my associate, Mr. Fleishman, come down here because he has personal knowledge of this case and can so testify. I don't want to do that unless I have to.

MR. IMHOFF: I think the only thing we can consider is the record, in any case.

THE COURT: The record will speak for itself. All right. Now, let's look at Bloss versus Dykema. That's 1347.

MR. McDANIEL: The cite was 1727 in 90.

THE COURT: Well, again we have the same situation where they refer to Redrup. There is no indication that that's the point upon which the Supreme Court granted certiorari. So we'll have to see Redrup.

MR. IMHOFF: Let's see. So far we have—

THE COURT: So far we have B, D and E. And we have to determine P and—

MR. IMHOF: R. Those are the two films.

THE COURT: Right.

MR. IMHOFF: And these two boxes, these are what?

THE COURT: J and G.

MR. IMHOFF: So we have to decide P and R and J and G.

THE COURT: Well, we have to see what Redrup says.

MR. McDANIEL: I think the dissent here helps to supply the context in Hoyt, of course, because it shows that the dissenters were very unhappy with that decision.

(There was held a recess.)

MR. McDANIEL: "A finding of reversal of an obscenity conviction," citing Redrup, "by the Supreme Court stands for the proposition that under no constitutional test can the materials be found obscene."

And so I ask your Honor to read for the per curiam here. And that's the text of the opinion.

I was going to ask your Honor another question. I have to rent a 16 millimeter machine unless the Court has one available. I thought perhaps it might.

THE COURT: The court has no equipment.

Does the City Attorney's office have a 16 millimeter?

MR. IMHOFF: We don't. The police department supplies these projectors to us. I don't know whether they have a good 16 millimeter or not.

MR. McDANIEL: Well, I can rent one.

THE COURT: We'll see. If not, you'll just have to rent one.

Well, it seems that the dissent in the Redrup case, Redrup et al., narrows down the issue upon which the Court made its decision. I hate to be as sacrilegious as to criticize the writings of the Supreme Court justice. However, the majority opinion does not clearly set out the fact that it has decided that its ruling is based upon its finding of lack of obscenity.

However, in Mr. Harlan's dissent on page 1417, he says "The three cases were argued together at the beginning of this term," referring to Redrup, Austin and Gent. "Today the court rules that the materials could not constitutionally be adjudged obscene by the states, thus rendering adjudication of the other issues unnecessary. In short, the court disposes of the cases on the issue that was deliberately excluded from review and refuses to pass on the questions that brought the case here."

So in the language in the majority opinion on 1416, the first paragraph:

"We have concluded, in short, that the distribution of the publications in each of these cases is protected by the First and Fourteenth Amendments from governmental suppression, whether criminal or civil, in personam or in rem."

Footnote 6: "In each of the cases before us, the contention that the publications involved were basically protected by the First and Fourteenth Amendments

was timely but unsuccessfully asserted in the state proceedings. In each of these cases, this contention was properly and explicitly presented for review here."

So—

MR. IMHOFF: The court merely, though, in Redrup, your Honor, says, regardless of which view we take—and they lay out several views of different justices. It just says that, under any of these views, we have to reverse the decision. It doesn't give us any specific holding in this case. It takes the easy way out and says—counsel is only offering this evidence on the issue of contemporary community standards. That's all it would be relevant to. And we have no finding here in Redrup that the material is not beyond contemporary community standards.

MR. McDANIEL: It sets a standard of nonobscenity; can't be found obscene; can't be prosecuted. It couldn't be more clear cut.

MR. IMHOFF: I disagree with that, your Honor. Even if they had said it was not obscene, which they don't say here—

MR. McDANIEL: They don't?

MR. IMHOFF: Even if they had said it was not obscene, again we get back to the issue of contemporary community standards. And a book or a film or a picture can be found not obscene on any one of three grounds, three bases. It could be found not obscene and still go beyond contemporary community standards of the average person. Just because something is found not obscene does not mean that it does not go beyond contemporary community standards.

MR. McDANIEL: I think that goes to the weight of it. But it certainly provides a standard of nonobscenity which the Supreme Court has ruled upon.

MR. IMHOFF: The issue, though, is not nonobscenity of these materials.

MR. McDANIEL: Well, I think it is.

THE COURT: Actually, discussing the particular statutes involved, to wit, the statutes of the states of New York, Kentucky and Arkansas, paragraph 2, second column, page 1415: "In none of these cases," referring to the three cases involved herein, "was there a claim that the statute in question reflected a specific and limited state concern for juveniles," citations following. "In none was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure," citations following.

"And in none was there evidence of the sort of 'pandering' which the court found significant in *Ginzburg versus United States*."

MR. McDANIEL: Then they go on to say, under any constitutional test it can't be found obscene.

MR. IMHOFF: But they don't lay that down as a test, your Honor, what you've just read.

THE COURT: They refer to the Roth decision. Although Harlan appears to have written the Harlan decision, and he doesn't think it comes within that purview—so there you are.

MR. McDANIEL: If I could go off the record—

THE COURT: Well, the authorities submitted by the defense is very compelling, and I can't find a decision more binding than that of the Supreme Court of the United States, especially involving the constitutional issues presented, particularly the protections* afforded by the First and Fourteenth Amendments. As a consequence, the Court will rule that the questioned matters may be used if they are comparable.

Insofar as Adam and Eve is concerned, that's J—

MR. McDANIEL: And you'll take judicial notice on each of those two, as you indicated previously, I believe. Correct?

THE COURT: Pardon?

MR. McDANIEL: You'll take judicial notice on those cases as—

THE COURT: I don't think I have any alternative.

MR. McDANIEL: Right.

MR. IMHOFF: I'd like the record to reflect my previous objections.

THE COURT: The record will so show.

All right. Insofar as Adam and Eve is concerned, Counsel, does it have the four-letter words found in Suite 69?

MR. McDANIEL: And it's indistinguishable—

THE COURT: And does it have the voyeurism and the flagellation and the Lesbianism and the heterosexuality and homosexuality and tri and *quatrello* sexuality that the other one has?

MR. McDANIEL: Yes. As far as I remember, it was—I might add, there was five actual books in Hoyt. And I'll bring in the others if it becomes necessary. I hate to take this jury's time with five books.

MR. IMHOFF: I would request the Court read the book and give the People a chance to read the book prior to the ruling as to whether it's comparable or not.

THE COURT: Well, all right. I guess you have the right to that. I'll just have to read it during the lunch hour. It's 11:00 o'clock. All right. Now, the Redrup decision now controls which exhibits?

MR. McDANIEL: It controls J and C. J was Hoyt. C was Bloss.

MR. IMHOFF: What was C?

MR. McDANIEL: Jaybird Photographer 9.

MR. IMHOFF: Is that a paperback?

MR. McDANIEL: That's a magazine.

MR. IMHOFF: Wait a minute. I've got G down here. What was G? They were rejected.

MR. McDANIEL: Just to give you a minute description of this book in Hoyt, I'll read what the Minnesota Supreme Court said about it. "It's unnecessary to discuss the details of these books further than to observe that the theme of each is pointless, save as it serves to relate the characters to repeated accounts of lewd and degrading episodes. They deal with filth for the sake of filth."

THE COURT: Now, what about B?

MR. McDANIEL: That was the Bonanza. You've already ruled on that.

THE COURT: Yes, that was the Appellate Department.

MR. McDANIEL: You kicked out F and G and kicked out H and I; and you kicked out L and M, and I withdrew N and O.

THE COURT: Accepted J.

Now, K is rejected, L is rejected, M is rejected. And we now have to rule on P and R. That's all that's left. A is rejected.

MR. McDANIEL: You want to see those movies right now or shall we go back and do the jury thing?

THE COURT: Yes, let's do the jury thing.

Can we see at least one of the films during the lunch hour?

MR. McDANIEL: Yes, assuming I can whip out and get a 16. Henry's Camera, I guess, would have it.

MR. IMHOFF: Have you ruled on C? I would object that it's not comparable, your Honor. It also in-

cludes text in this material, and there's much more writing and stories which do not make it comparable to the magazine that—

THE COURT: Well, there are portions that I think are comparable.

MR. IMHOFF: Again, your Honor, I'd point out that you cannot judge something by portions. All of these materials are judged taken as a whole by any court, and you can't lift photographs out of something and judge just the photographs on something that was found not obscene, because the writing may have had a very important part in the judgment of whether something was obscene or not. The photographs standing by themselves may well have been found to be obscene by a court in the same instance.

MR. McDANIEL: It's 99 per cent a picture book.

THE COURT: Well, of course, the comparable portions—the magazine, of course, can be broken down into its component parts.

MR. IMHOFF: But you can't represent, your Honor, to the jury that this magazine—that the pictures were found not to be obscene in this magazine.

MR. McDANIEL: Well, they were—the whole magazine was found not obscene.

MR. IMHOFF: And the text and the writing may have had a very important part in the determination of whether or not it was obscene or not.

MR. McDANIEL: Not in a Redrup reversal.

MR. IMHOFF: If it were merely photographs and pictures coming close to the same thing that I have, then I think the argument may have some validity, but—again, we're getting our eye off the ball, getting away from the test on obscenity.

MR. McDANIEL: That's for your argument, Counsel.

THE COURT: Well, that would be within argument. You may be right that it is not comparable on all fours, but it does seem to be substantially comparable where it depicts male and female nudes posed. And, as a consequence, that's the portion of the magazine that will be submitted to the jury.

And you're instructed to so limit—

MR. McDANIEL: We'll forget about the text.

MR. IMHOFF: I would object strenuously to the introduction of this material on the basis that the jury is not considering it as a whole, as all material has to be considered in determining obscenity. And you cannot take a portion of something found not obscene and use it as a comparable to a magazine, book or film or any other thing in issue in a case. And my objection—I have strenuous objections to all this material on the basis that it's irrelevant to the contemporary community standards. No authority in any of the cases, as far as I'm concerned, permits the introduction of this material on the issue of contemporary community standards. I just want to get that in the record.

THE COURT: Very well. The record will so note. N and O. What about those?

MR. McDANIEL: I'm pulling them back.

THE COURT: Okay. They're withdrawn.

(Recess.)

(The following proceedings were held in open court:)

THE COURT: Case of People versus Murray Kaplan.

The record will show the defendant is represented by counsel, the People are present and represented, the jurors are all seated in their respective places in the jury panel box.

Very well. Do you wish to make an opening statement at this time, Mr. McDaniel?

MR. McDANIEL: Yes. Thank you, your Honor.

(Opening statement by Mr. McDaniel.)

MR. McDANIEL: I will at this time ask your Honor to indicate to the jury and perhaps let them examine these materials that have been found not obscene. I would ask your Honor to give them the judicial notice on those facts at this time, if I may.

THE COURT: Yes.

Defendant's B, Defendant's C, Defendant's D and E, Defendant's J—

And we've reserved ruling as to P and R; is that correct?

MR. McDANIEL: Yes.

THE COURT: All right.

MR. McDANIEL: Excuse me, your Honor.

One other point I forgot to mention. Perhaps unfortunately, this case involves one count on a written word book that you had this fellow, Mr. Helphand, read. Since that's in the case, I found it necessary to introduce another book which was found not obscene. And although I hate to say it, that one's going to have to be read to you also.

THE COURT: As to Defendant's B which consists of two magazines stapled together, one entitled Eager Beaver and the other entitled Fluff, the Court takes judicial notice of the fact that these two volumes were the subject of a decision of the Supreme Court of the United States—

MR. McDANIEL: Excuse me, your Honor. That's Exhibit C. These are the Bonanza—

THE COURT: I beg your pardon.

Defendant's B are the subject matter of a decision

of the Appellate Department of the Superior Court of Los Angeles County finding that the contents thereof are not obscene. I'll state that over again. A finding of the Appellate Department of the Superior Court that the contents in the magazines are not obscene.

Then the Court take judicial notice that Defendant's C, a magazine entitled Jaybird Photographer No. 9, the subject matter of a proceeding before the Supreme Court of the United States; found the magazine not to be obscene.

Defendant's D and E, D being a magazine entitled The Foxes and E being a magazine entitled Fantastic—the Court takes judicial notice that these items were found not to be obscene in a proceeding before the Beverly Hills Municipal Court, the Beverly Hills Judicial District.

Defendant's J—the Court takes judicial notice that Defendant's J was the subject matter of a proceeding before the Supreme Court of the United States wherein it was found that this item was not obscene.

I will further advise the jury that the decisions of the Appellate Department of the Superior Court and the decisions of the Supreme Court of the United States are binding on this Court. The decisions of the Beverly Hills Judicial District can only be considered as persuasive but not binding.

MR. McDANIEL: Your Honor, I move the introduction into evidence of those exhibits at this time.

MR. IMHOFF: People would object to the introduction of these items into evidence on the grounds previously stated in chambers.

THE COURT: The objection is overruled. The items will be received bearing the alphabetical designation assigned.

MR. McDANIEL: Perhaps before I offer those exhibits to the jury to inspect, it would be better to go on with my expert witness, if that's okay. So I would do that.

THE COURT: Very well.

DEFENSE

MR. McDANIEL: At this time we call Franklin Laven to the stand.

FRANKLIN LAVEN,

called as a witness by and on behalf of the defense, having been first duly sworn, was examined and testified as follows:

THE CLERK: Would you state your name for the Court.

THE WITNESS: Franklin D. Laven, L-a-v-e-n.

THE COURT: Before we proceed, the Court will withdraw reception of Defendant's J in evidence at this time until the Court has had an opportunity—it was requested by the People that the Court read the text to determine whether it is comparable. As a consequence, I'll read that during the lunch hour. The Court will rule after having read it.

DIRECT EXAMINATION

BY MR. McDANIEL:

Q State your occupation, Mr. Laven.

A I am an attorney at law.

Q How long have you been so engaged, and where is your principal office?

A I have been engaged since 1938. My principal office is at 530 West 6th Street, Los Angeles.

Q Do you have any particular specific fields that you operate in as a lawyer?

A Yes, I do.

Q What are those?

A. We determine First Amendment rights. We can determine adult material, both adult editorial and pictorial material, and we can also determine criminal law.

Q Have you had occasion to become thoroughly familiar with decisions of courts, from the Supreme Court of the United States on down, involving questions of First Amendment rights and/or obscenity of materials?

A Yes, I have.

Q Have you had an occasion to see the exhibits that are involved in this particular prosecution, a magazine entitled Yum-Yum, a paperback book entitled Suite 69, and a film entitled Tammy and Danny?

A Yes, I have.

Q Now, have you ever been associated with the Presidential Commission on Obscenity and Pornography?

A I have.

Q State to the jury what your function with the Presidential Commission on Obscenity and Pornography is or was, sir.

A My function—

MR. IMHOFF: Object to that, your Honor, as being irrelevant to the issues in this case.

MR. McDANIEL: This goes to his qualifications, your Honor.

THE COURT: It appears that the objection would be premature at this time. For that reason, the objection will be overruled.

THE WITNESS: My function was that I made a survey for the Commission as to traffic, traffic meaning

the quantity of distribution of editorial and pictorial—
editorial and pictorial material throughout the United
States.

BY MR. McDANIEL:

Q Did that include the entire State of California?

A That included the entire State of California and
it was primarily directed to determine the volume that
was produced and the volume that was sold.

Q Did you also have association with the members
of the Commission staff who handled the other parts
of the survey involving standards?

MR. IMHOFF: Object, your Honor. The question
is vague and irrelevant.

THE COURT: Sustained.

You may rephrase your question.

BY MR. McDANIEL:

Q Did you also discuss and work with the members
of the Presidential Commission staff which engaged in
other portions of the survey activity involving a deter-
mining of national and state-wide standards?

A Yes, I did.

Q Now, will you please describe what the findings
of these surveys were, sir.

MR. IMHOFF: Object, your Honor, as irrelevant
to qualifications as an expert in this field, immaterial.

THE COURT: The objection will be sustained.

Would you describe the nature of the survey, please,
what type of survey was taken, insofar as determining
the state-wide standard in the State of California.

THE WITNESS: There was no particular survey
that was made, as far as the Presidential Commission
was concerned, as to the State of California. It was
made to the United States as a whole. However, I—
from my experience, I do have an opinion as to what

percentage would relate to the State of California as to the total amount of distribution, publication and distribution, of adult material throughout the United States.

The survey that I conducted related to the secondary distributors, as we call them, as compared to ID's, known as independent, which distribute the general type of reading.

MR. IMHOFF: Your Honor, object to any further testimony as nonresponsive to the question.

THE COURT: The objection will be sustained.

BY MR. McDANIEL:

Q Mr. Laven, we'll have to break this down step by step. I can see that coming, so I'll ask you some questions, specific questions.

First of all, your survey of distribution of material was conducted in conjunction with the survey of what the standards of the United States are; is that correct?

A That is correct.

Q And in these surveys activities—

MR. IMHOFF: Object to that, your Honor; move that it be stricken as irrelevant to state-wide standards.

THE COURT: Overruled. That answer may stand.

BY MR. McDANIEL:

Q Now, all of these survey activities conducted by the Presidential Commission were conducted for the United States as a whole, specifically, including the entire State of California; is that correct?

A That is correct.

Q What is the approximate percentage breakdown of the State of California, as opposed to the United States as a whole?

A In my opinion, it is at least 20 per cent.

Q And do you base that on a population basis of over 20 million in the State of California?

A I base it partially on the population basis, and I also base it upon my knowledge of the amount of—quantitative amount of material of the adult type that is distributed within the State of California by various publishers and distributors.

MR. IMHOFF: Your Honor, I object and move the answer be stricken as irrelevant to contemporary community standards, the amount of material published or sold.

THE COURT: Well, we're going to the qualifications. If you wish to enter an objection as to the qualifications at the appropriate time, the Court will consider the motion.

The objection will be overruled.

BY MR. McDANIEL:

Q Now, independent of your work with the Commission in these survey activities, there are other bases for your knowledge of—other bases besides—I'll strike that and start over again. I'm getting confused myself.

You, in rendering opinions, base your opinions not only on your survey activities engaged in as a member of the Commission staff but also on other factors; is that correct?

A That is correct.

Q Would you please detail to the jury what your experience in traveling throughout the entire State of California is, first.

MR. IMHOFF: Object; assumes a fact not in evidence.

BY MR. McDANIEL:

Q If you have traveled throughout the State of California.

A I have traveled throughout the State of California.

Q And have you—

THE COURT: Please read the last question and answer.

(The record was read by the reporter.)

MR. IMHOFF: I objected, your Honor, because it assumed a fact not in evidence.

MR. McDANIEL: Then I added, if you've traveled.

THE WITNESS: My answer was, I have traveled.

THE COURT: Very well. The objection will be sustained.

BY MR. McDANIEL:

Q Have you ever traveled throughout the State of California, Mr. Laven?

A Yes, I have.

Q Have you, during your travels throughout the State of California, made an attempt to determine what types of adult materials or sex-oriented materials are available and sold throughout the State of California?

A Yes, I have.

Q Have you also made an attempt to determine what the people in the State of California's viewpoints on this phenomenon are?

A I have.

Q Have you visited San Diego, California, sir?

A Yes, sir, I have.

Q Have you gone into bookstores, newsstands, motion picture theatres and film arcades in San Diego, sir?

A Yes.

Q Have you discussed the phenomenon of sex-oriented media with people in the San Diego area?

A To quite a great extent, yes.

Q Now, with regard to the Orange County area, have you done the same activity there that was alluded to in the previous list of questions?

A Yes, I have.

Q And how about with regard to Los Angeles County, sir?

A To a great extent, yes.

Q And have you also visited the metropolitan area known as San Bernardino, Riverside?

A Yes, I have.

Q And have you determined what types of adult media are sold, exhibited and available in that area?

A I have.

Q Have you also discussed these issues with people in that area?

A Yes, I have.

Q Have you had the same experience in Santa Maria, sir?

A Yes, I have.

Q Have you had the same experience in the entire Bay area, including the East Bay, Oakland area, and San Francisco itself, as well?

A Yes, I have.

Q Have you also had occasion to get down to the southern part of the Bay area, the San Jose metropolitan area?

A Yes.

Q Have you also had the same experience in the Sacramento metropolitan area?

A Yes, I have.

Q And have you also visited other smaller population centers in the State?

A Yes, I have.

Q Have you also developed expert knowledge in this area by another basis, that of discussions and interviews with people who are engaged in the publication of adult-oriented materials?

MR. IMHOFF: Object, your Honor. That calls for a conclusion.

THE COURT: Would you read the question, please.

(The question was read by the reporter.)

THE COURT: The objection will be sustained.

You may rephrase your question.

MR. McDANIEL: All right.

BY MR. McDANIEL:

Q Have you also developed your knowledge of the subject matter which you're being asked to testify on here by other bases, including interviews and discussions with publishers and distributors of adult-oriented material?

A Yes, I have.

Q Have you also discussed these particular issues previously alluded to with other people, such as attorneys in the First-Amendment-law field?

A Yes.

Q Have you also discussed these matters with behavioral scientists, such as psychiatrists and psychologists?

A Yes.

Q Have you also indeed discussed these matters with police officers and law enforcement officials throughout the State?

A Yes.

Q And have you discussed these matters with members of the district attorney's office of Los Angeles County?

A I have on some occasions, yes.

Q Now, going to the survey that you personally undertook for the Presidential Commission on Obscenity, that was the one regarding the amount and volume of distribution of adult-oriented materials; is that correct?

A It's the amount of production and the distribution and sales, yes.

Q I see.

Now, you've seen People's 1 and People's 2—that's the paperback book and the magazine entitled Yum-Yum—already and have read those materials; is that correct?

A That is correct.

Q With regard to your survey of the distribution and sale of adult-oriented materials, it is based on materials which are comparable to those in those two exhibits?

MR. IMHOFF: Object to that, your Honor, as irrelevant, and calls for speculation and a conclusion.

THE COURT: Have you concluded your voir dire examination, Mr. McDaniel?

MR. McDANIEL: No, I have not. I have not yet concluded voir dire.

THE COURT: Well, this would not be voir dire subject matter. On that ground, the objection will be sustained.

MR. McDANIEL: All right.

BY MR. McDANIEL:

Q Did this survey activity which you undertook consist of—rather, did the subject matters of the materials described consist of magazines involving photographs of full nudes, both men and women, with genital exposure as part of the materials sold and distributed?

A Yes. That was—

MR. IMHOFF: Object again, your Honor; same grounds.

THE COURT: Sustained.

BY MR. McDANIEL:

Q Tell us what types of subject matter were included in your survey activity, sir.

A The type of material that were included in the survey—

THE COURT: Now, which survey are you talking of, your private survey or the Presidential survey?

MR. McDANIEL: This is the Presidential survey, I believe, we're talking about now.

THE WITNESS: I'm talking about the survey I made on behalf of the Presidential Commission. That included several categories.

MR. IMHOFF: I object again, your Honor, to any testimony on this area as irrelevant and incompetent as far as qualifications are concerned.

THE COURT: This is as to the type of survey—that's the thrust of your question?

MR. McDANIEL: Yes.

THE COURT: Overruled.

THE WITNESS: Yes, it consisted of a breakdown into various categories, among them being movie magazines—incidentally, all these are adult material—nudist magazines—

MR. IMHOFF: Object to that as calling for a conclusion, your Honor.

THE COURT: Pardon?

MR. IMHOFF: I object to that as calling for a conclusion.

THE COURT: Overruled.

You may answer.

THE WITNESS: It included movie magazines, nudist magazines, boy books, as we call them—

BY MR. McDANIEL:

Q What are those, sir?

A Boy books are primarily pictorial nude males.

Q Okay. Go ahead.

A We have—another category we call boy-girl, which is of the type of Yum-Yum in this particular case. We have double girl.

Q Two girls or more together?

A Yes. We have girlie books in which there are no splits, and then we have girlie splits.

THE COURT: What are splits?

THE WITNESS: Splits are where the genital area is exposed, where they're spreading the legs.

BY MR. McDANIEL:

Q And your survey, did it also cover paperback books devoted to sex? Is that right?

A Not only in this case, but in 1966 I made a survey of paperback books as well.

Q So you've made two separate surveys on that issue; is that right?

A That is correct. The one in '66 was in conjunction with Harold Farringer out of Buffalo, New York.

Q That's another attorney in First Amendment law?

A That is correct.

THE COURT: That would be 1966 and 1970?

THE WITNESS: No. The survey was made in relation to a case in the Superior Court in this county, and it was known as People versus Zentner. And Mr. Farringer and myself made a survey in that case as to the traffic in paperback books only, because there were only paperback books involved in that case.

BY MR. McDANIEL:

Q That was in '66?

A 1966, going into '67.

Q And then your most latter survey was throughout 1969 and portions of 1970?

A That is correct.

I might add that the 1970 survey was probably more accurate and more comprehensive and in greater detail.

MR. IMHOFF: Object to that, your Honor, as not responsive.

THE COURT: The objection is sustained. The answer is ordered stricken, and the jury is admonished to disregard it.

BY MR. McDANIEL:

Q Did the survey activities that you undertook that you've testified to involve paperback books that contained explicit sexual descriptions, such as we see in the book charged in this case?

A Yes, it did.

MR. IMHOFF: Object to that, your Honor. That calls for a conclusion.

THE COURT: "Such as we see charged" could be a conclusion. The objection will be sustained.

You may rephrase your question.

MR. McDANIEL: All right.

BY MR. McDANIEL:

Q Did the two surveys that we're talking about now, the '66 and the '69-'70 survey, both include information regarding distribution and sale of paperback books which contained graphically explicit sexual passages?

A Yes, they did.

Q Now, what's the total sale of these types of material, sir?

MR. IMHOFF: Object to that, your Honor, as irrelevant and—

THE COURT: Sustained.

BY MR. McDANIEL:

Q Mr. Laven, does the amount of sale of material give us any indication of—any degree at all of what our standards are?

MR. IMHOFF: Object to that, your Honor, as calling for a conclusion and irrelevant.

THE COURT: On the latter ground, the objection will be sustained.

Remember, Mr. McDaniel, that we're in the voir dire stage.

MR. McDANIEL: I see. Pardon me.

BY MR. McDANIEL:

Q Now, with regard to motion picture film, I believe you've already testified that you're familiar with the types of adult-oriented motion picture films shown throughout this State; is that right?

A That is correct.

Q And does that include both motion picture film which is sold in a bookstore to a purchaser as well as motion picture film which is exhibited to adults in theatres and in arcades?

A Yes, it does.

Q Now, are there other factors which I have either forgotten about or left out which you use in reaching your opinions in these subject matters?

A Yes.

MR. IMHOFF: Object to that, your Honor. That question is vague.

THE COURT: Overruled.

You may answer.

THE WITNESS: Yes.

BY MR. McDANIEL:

Q List those.

A Well, you had previously asked as to discussing First Amendment problems with other attorneys. I attended a seminar in Puerto Rico in April of 1970. At that time the majority of attorneys dealing in First Amendment rights were present, and I did participate in the seminar. Likewise, I have served as a consultant to many publishers. That has been throughout the 10, 11 years that I have specialized in this field. That is, I have served as a consultant for an opinion as to the—whether or not in my opinion the material was constitutionally protected by reason of the various decisions of our courts, both California and the United States Supreme Court.

Q When you use the phrase "constitutionally protected," does that mean that the material is not obscene?

A Yes, I would say it is synonymous with not obscene.

MR. IMHOFF: Object to that, your Honor; move it be stricken. That calls for legal conclusion.

THE COURT: Overruled. He is defining his own terminology.

THE WITNESS: I have served as a consultant or a technical advisor as to the constitutional protection of various motion pictures that are now being distributed throughout the United States and in the State of California.

BY MR. McDANIEL:

Q And, of course, you're not connected with me. I'm not working for you or anything like that; is that right?

A No, you're not.

I might likewise say that I have defended probably—or been involved in in excess of 100 of this type of case where First Amendment rights are involved. That's at all levels.

Q I see. In other words, a trial court through all the appellate steps; is that correct?

A That's correct.

Q All right.

Now, based on this background and experience that you've given to us, first of all do you have an opinion with regard to whether or not the materials charged in this case, the film, the paperback book and the magazine, are within customary limits of candor in this State, utilizing contemporary standards to determine that?

THE COURT: Just one moment, please.

Have you concluded your voir dire?

MR. McDANIEL: Yes.

THE COURT: All right. You may examine.

MR. IMHOFF: Thank you.

VOIR DIRE EXAMINATION

BY MR. IMHOFF:

Q Mr. Laven, you stated that you traveled to San Diego, Orange County, and several other cities.

How many people did you talk to in San Diego?

MR. McDANIEL: I'd object on relevance, your Honor.

THE COURT: Overruled.

You may answer.

THE WITNESS: In San Diego, I probably talked to 50 to 75 people.

BY MR. IMHOFF:

Q And when was this?

A That was over a period of time.

Q What period of time?

A That would be primarily from August—during August and September of 1970 and also of 1969.

Q And these 50 or 75 people that you talked to, sir, were they mostly people who were involved in the business of selling or exhibiting films or books?

A No. Those people would increase the amount.

Q Well, what kind of people were these 50 to 75 people you talked to?

MR. McDANIEL: Objection, unintelligible. What kind of people?

THE COURT: Overruled.

You may answer.

THE WITNESS: They were adults, male and female.

BY MR. IMHOFF:

Q And did you talk to them all at once?

A No.

Q Well, where did you talk to them?

A I can explain this quite simply because during August and September, my family is down at San Diego regularly for the summer months. And I would go down there over weekends. And groups at the place where we were staying or groups in restaurants, or it could be at other places—it could be at bars. We'd talk to them there. I would possibly raise the subject matter or they would raise the subject matter, asking what my occupation was. Being a lawyer, I would say a lawyer.

Q In other words, these were just casual conversations you'd have with people you'd meet on vacation or when you were visiting down there; is that correct?

A Well, they were a little bit more than casual. They would get into some detail, because of my interest in the subject matter.

Q Were these people usually people that you knew well?

A No. They were people that I would not have known for any great length of time, people who would get into the conversation.

Q And was your conversation mostly concerned with what is sold or distributed with regard to books or magazines or films?

A I don't quite follow your question.

Q Well, your conversation with them, in essence was it concerning what is sold or distributed in regard to books or films, sex orientation?

A Yes, as to adult-type material. The conversations would be in that relation.

Q Did you ever take any survey in the State of California, any formal survey, wherein you asked the people if any specific material went beyond the standards of their community?

A I have not made any detailed survey, but I have had clients or customers of clients—

MR. IMHOFF: Your Honor, object to any further answer as not responsive to the question.

THE COURT: Overruled. He may explain his answer.

THE WITNESS: I was saying I've had customers of my clients make surveys in their bookstores or in their theatres as to public opinion of the patrons of those businesses.

BY MR. IMHOFF:

Q And those were customers of the places that buy that kind of material; is that correct?

A Yes.

Q When you were in San Diego and you talked to these 50 or 75 people, did you ask them the question of whether any specific type material went beyond the standards of their community?

A Not specifically that. The conversations would be in general as to explicit adult material, not whether it went beyond the standards.

It would come to the point of saying, well, if one thing is accepted, why, practically everything is accepted. In other words, there was no drawing of a line of what would or would not be accepted, if the explicit sexual material was accepted at all.

Q When you visited the Orange County area, how many people did you talk to?

A Possibly 50.

Q And when was that?

A I have visited Orange County continuously for the past several years, by reason of the fact that I have clients who are entitled in the distribution business in Orange County, as well as being involved in several cases in Orange County.

Q You talked to approximately 50 people in Orange County. Is that your answer?

A At least that.

Q And you can't give us any specific time in which you talked to most of these people?

A Well, it would be spread over the last two years.

Q And were these people clients of yours?

A No.

Q And where did you meet most of these people?

A These people would have been met "in book-stores. They would have been met in restaurants. They would have been met in bars. They would have been

met in courtroom corridors. They might have been met—should I stay out there, or they would have been met at the hotel or the motel which I was staying at.

Q And did you ask these people specifically if any certain material, types of material, went beyond the contemporary standards of their community?

A Not in that form.

Q When you went to San Bernardino County, how many people did you talk to?

A San Bernardino County would be approximately 20 people, 25.

Q And when did that take place?

A This was over a period, I believe, last October, somewhere at that time, during that period.

Q And where did you meet those people?

A Those people would have been met in restaurants, the hotel or motel at which I was staying, courtroom corridors.

Q Were they just strangers that you would meet, mostly?

A Well, we'd get involved in conversations. It's not unusual to get involved in a conversation, inquiring to someone as to what their thoughts might be or what their opinions might be or what their feelings might be as to adult-type material. It's a subject that I'm very conscious of and that I look to get involved in conversations with strangers.

Q Did you ask any of them whether any specific type material—

MR. McDANIEL: I don't believe he finished his answer, your Honor.

THE COURT: Have you finished your answer?

THE WITNESS: That will suffice.

BY MR. IMHOFF:

Q Did you ask any of these people specifically whether any certain specific type of material went beyond the standards of their community?

A Not in that form.

Q In other words, it was just sort of informal, casual discussions with them?

A No, that is not correct, not as to—your question was as to whether any particular type of material went beyond the standards of their community. When I had become involved in conversations, it has been primarily on the basis of the adult-type material which is the explicit sexual material, not saying, "Do you accept splits?" or, "Do you accept doubles, boy-girl?" or, "Do you accept boy magazines?" or, "Do you accept trios?" or anything of that sort. It ultimately gets into that conversation, and then, very frankly, it gets into a conversation of what the feeling is as to the type of material that is now on the market today described as manuals where there is penetration and where there is—

MR. IMHOFF: Object to that, your Honor, as not responsive to the question; move it be stricken.

THE COURT: The motion is granted.

BY MR. IMHOFF:

Q When you went to Santa Maria, how many people did you talk to?

A Probably 50 in Santa Maria.

Q And over what period of time was that?

A That was during 1970. It would be spread over a period of possibly six months.

Q Did you meet these people in substantially the same places you met the other people in the other cities?

A I met some of them in the place of business of

a client of mine in Santa Maria. I would say I probably met 20 people at his place of business that I discussed the subject matter with. Other people would be in the same areas that I described before.

Q And the San Francisco Bay area. When did you—how many people did you talk to there?

A Probably, on the over-all, a hundred.

Q And over what period of time was that?

A That would be over a period of—within the last two years.

Q Spread out over the last two years?

A Yes.

Q Did you meet these people in basically the same places you met the others?

A Yes, including—in San Francisco—in the Bay area would include the places of business of the clients that I did go to see.

Q Is that the San Jacinto Mountain area?

A No. San Jacinto Mountain area would be Palm Springs.

Q Did you testify to the San Jacinto Mountain area before?

THE COURT: The San Jose metropolitan area, as I recall.

MR. IMHOFF: Right.

BY MR. IMHOFF:

Q The San Jose metropolitan area. How many people did you talk to there?

A Probably around 20, 25.

THE COURT: This might be an appropriate time to take a break in the presentation, have our lunch recess. As this matter was being presented, the Court made an important luncheon engagement. Therefore,

I won't be able to read Defendant's J until after the close of session.

Ladies and gentlemen of the jury, you're again admonished that you're not to discuss this matter among yourselves nor with anyone else, nor are you to form or express any opinions thereon until the matter is ultimately submitted to you.

You're excused at this time and ordered to return back to this courtroom at 1:30 p.m. without further order, notice or subpoena.

All parties are excused and ordered to report back at 1:30 p.m. without further notice, order or subpoena.

(Noon recess.)

LOS ANGELES, CALIFORNIA,

TUESDAY, JANUARY 26, 1971

2:00 P.M.

THE COURT: People versus Murray Kaplan.

The record will show that the defendant is represented by counsel, the People are present and represented, the jurors are all seated in their respective places in the jury panel box.

Mr. Laven has resumed the witness stand.

You may resume your examination, Mr. Imhoff.

MR. IMHOFF: Thank you, your Honor.

May I have the last question and answer reread?

(The record was read by the reporter.)

VOIR DIRE EXAMINATION (RESUMED)

BY MR. IMHOFF:

Q Did you see these people, sir, in similar circumstances as to the other places you've testified to?

A Yes, sir, the circumstances are similar.

Q Did you ask any of these people whether or not any specific material went beyond the customary limits or were beyond the contemporary community standards of their community?

A It would be basically a general discussion of adult material or the sex-oriented material.

Q But you didn't ask them that question?

A As to specific material?

Q Yes, or that specific—

A I probably—if I'm not mistaken, I did have samples of various types of adult material that we've been discussing, and I did show it to them.

Q Did you ask them the question that I just asked?

A Yes, I did.

Q Did you ask them that specifically?

A I would ask them as to what their opinion as to the material, as to whether it was within the limits of candor of this community, the State of California.

Q Did you ask them whether or not the material was beyond the contemporary community standards of their community?

A Not their community, sir. The State of California.

Q You didn't ask that specific question?

A I asked the question in relation to the State of California, not their community.

MR. IMHOFF: Your Honor, I'd ask that be stricken as nonresponsive, the answer to the question.

THE COURT: The motion is granted. The answer is ordered stricken.

The jury is admonished to disregard it.

BY MR. IMHOFF:

Q You did not ask the question I specifically asked you; is that correct?

A Not there, no.

Q How many people did you talk to in the Sacramento area, sir?

A 25, 30.

Q Did you meet them under similar circumstances as the other places?

A Yes, sir.

Q And about when did you talk to these people?

A Sacramento was—I believe it would be around September of 1970, and then prior to that, about six months prior to that.

Q Did you ask any of these people in any of these cities whether any specific material went substantially beyond the customary limits of candor in its depiction or representation of these matters?

A Yes, I did.

Q You asked them that specific question?

A Not in the way that you framed it.

Q Then you didn't ask it?

A Not the way that you said.

MR. McDANIEL: Object to him arguing with the witness.

THE WITNESS: Not the way that you framed it, sir.

THE COURT: The witness will be admonished not to argue with counsel.

And, Counsel, you're admonished not to argue with the witness.

Listen carefully to the question posed to you, sir, and respond directly to the question, if you will.

THE WITNESS: Yes, your Honor.

THE COURT: Would you read the question to the witness, please.

(The testimony was read by the reporter.)

THE COURT: All right. You may proceed.

BY MR. IMHOFF:

Q Then I asked, did you ask that specific question.

A Not in that words, no.

Q What about Eureka? Were you ever up there?

A I've been to Eureka but not in connection with this type of material.

Q Then you've never talked to anybody in Eureka with regard to this material, this type of material?

A I may have but it would not be of any consequence.

Q Now, of all the people that you talked to in these various cities that you've testified to, were any of them clients of yours?

A No.

Q About what percentage of them would you say you met and talked to in what you call adult bookstores or movie theatres where sexually oriented material is exhibited?

A Probably about 20 percent.

Q I believe you testified that you've defended a hundred cases involving—was that First Amendment rights, did you say?

A Yes.

Q About how many of those cases involved alleged violations of obscenity statutes?

A All of them.

Q So you mainly earn your living by defending this type of case; is that correct?

A I don't think that's a fair statement as to how I earn my living, Counsel. I don't think I can answer that.

Q Well, you do get paid for defending these cases most of the time, don't you, sir?

A Yes, sir, I do.

Q At the present time about how many clients do you have who are engaged in the production or sale of this type of material?

MR. McDANIEL: Your Honor, I'm going to object to this line of questions. I think that it's an invasion of his privacy.

THE COURT: Overruled.

You may answer.

THE WITNESS: Six or more. There are six that are on retainer, and there are others who I do represent from time to time.

BY MR. IMHOFF:

Q About how many would you say you have represented within the last year?

A When you say "clients," do you mean publishers or distributors or dealers, or what do you mean, sir?

Q Either publishers, distributors, dealers or exhibitors.

A Well, right now in my office there are approximately outstanding in the area of about 40 cases, and those are what I would call current.

Q Would you say that it would be a fair estimate of how many of this type of case you've handled in 1970, 40?

THE COURT: Well, it does appear we're leaving the voir dire field. Limit your inquiry to voir dire, please.

MR. IMHOFF: I have no further questions at this time, your Honor, as far as qualifications are concerned. But I would object to any testimony of this witness on contemporary community standards or limits

of candor, as the witness is obviously not qualified as an expert in this field.

THE COURT: The Court will reserve ruling on the motion at this point.

Mr. Laven, you made reference to having studied and being acquainted with a survey in connection with the President's Commission; is that correct?

THE WITNESS: Yes, your Honor, that is correct.

THE COURT: And this survey had to do with determination of contemporary community standards in the State of California, did it?

THE WITNESS: On the over-all, it did, sir, yes.

THE COURT: What type of survey was this?

THE WITNESS: The survey that I was involved in related to the traffic in—

THE COURT: What we're talking about is the survey done by the Commission in connection with contemporary standards which you indicate you made reference to.

THE WITNESS: Well, that was part of the report. I have the report here in front of me. And in order to arrive at contemporary standards, they took many things into consideration. They took traffic and they also took into consideration the various other surveys that were made as to the acceptance of the material in the community, what if—

THE COURT: That's what I'm interested in.

What type of surveys did the Committee engage in?

THE WITNESS: They—for one thing, as I say, they engaged in traffic and distribution.

THE COURT: Excluding traffic, what type of surveys did they engage in?

THE WITNESS: They engaged in surveys of the various outlets. They made a complete survey as to the

number of outlets in the State of California and other states, those being retail outlets. They made surveys as to the number of publishers and distributors of both editorial and pictorial material. They made sociological surveys; they made psychological surveys. There were surveys which were made by psychiatrists, psychologists.

MR. McDANIEL: Were these of public attitudes?

MR. IMHOFF: Your Honor, I would object.

THE COURT: Yes.

Counsel, I'll give you an opportunity, should it become necessary, to further examine the witness.

Was there any attempt by this Commission to determine specific public attitudes toward materials sexually oriented?

THE WITNESS: Very definitely, yes.

THE COURT: What type of surveys were done in this regard?

THE WITNESS: There were several surveys that were made by different persons, whether they be lawyers or whether they be sociologists or professors.

THE COURT: What type of surveys did they perform?

THE WITNESS: The survey that they made is that they conducted surveys of various adult bookstores. They conducted surveys at colleges. They conducted surveys—I would only have to phrase it as related to the man on the street.

THE COURT: Was this a questionnaire-type survey at the bookstores, if you know?

THE WITNESS: In some instances, it was. In some instances, it was by personal interview.

THE COURT: Do you know whether there was any predetermined effort to attempt to take a random sample of the population on an ethnic basis?

THE WITNESS: It was supposed to be done on that basis. Whether they—

THE COURT: A religious basis?

THE WITNESS: Yes.

THE COURT: And on a socio-economic basis?

THE WITNESS: That is correct.

THE COURT: Can you tell us what controls were introduced to achieve this, if any, if you know?

THE WITNESS: What they tried to do is get a cross-section of the community by going to various persons, persons of various religious denominations, age groups, sexes, economic circumstances, educational backgrounds, and so forth.

THE COURT: Are you personally familiar with their efforts in achieving this sampling?

THE WITNESS: I am personally familiar with it as to my discussions with members of the Commission and, likewise, by their report.

THE COURT: Now, with regard to the colleges, what type of survey was maintained at the colleges?

THE WITNESS: Well, for instance, in the colleges, I believe, one of the surveys that was conducted was in relation to the effect of sex-oriented material by repeated exposure to it.

THE COURT: Well, we're not concerned with effect. We're concerned with public attitudes, establishment of public attitudes.

What was done in that regard?

THE WITNESS: As far as the colleges, I have no personal knowledge of any survey that was made in any college in that regard as it related to personal attitudes.

THE COURT: Now what about the man-on-the-street survey that you indicated?

THE WITNESS: Yes, there was such a survey that was conducted.

THE COURT: Do you know what type of sample was used in that regard?

THE WITNESS: The type of samples, to the best of my knowledge, used in that regard was material that was available to members of the Commission which was the general type of material which was being generally distributed during the period of the survey from 1969 into 1970.

THE COURT: And was this—

THE WITNESS: It could be this book or that book or the next one. But generally, without any specificity, it was of the general type that was being generally distributed during that period.

THE COURT: Was this a survey to determine public attitude?

THE WITNESS: Yes, your Honor, it was.

THE COURT: All right.

Now, did you familiarize yourself with the compilations made by the surveyors in each of these three different surveys?

THE WITNESS: As they are reflected in the report, yes. I read that report, the report of the Commission, and I read their compilations. I was naturally more interested in my own compilations than somebody else's.

THE COURT: Now, in your informal survey in various localities that you indicated, such as Los Angeles County, Orange County, San Bernardino-Riverside area, Santa Maria, the Bay area, San Jose metropolitan area, Sacramento metropolitan area, were these discussions for the purpose of eliciting what the

individuals you talked to considered as contemporary standards in their community?

THE WITNESS: Let me say, as far as I was concerned, the discussions were for that purpose. As to the individuals, I would assume—it would be my presumption that they were a matter of general discussion. I, being very deeply concerned about this area, naturally want to talk to as many people as I possibly can to determine the attitudes and determine their acceptances.

THE COURT: Was this same situation in the formal discussions that you had at the various bookstores you mentioned?

THE WITNESS: That would be one of the purposes, yes, as to—I can say this, your Honor: that probably that to determine the acceptance, together with determining what particular type of material was moving at that particular time, which would give me an insight to pass on to the various publishers and distributors that I represent.

THE COURT: Were you assuming that because a particular publication was purchased—that it therefore must meet community standards?

THE WITNESS: No. That was not the basis of my determination. The basis of the determination would be as to what tolerance the purchaser had or what the acceptance was in the community of the particular material involved. The mere fact that something is purchased does not—did not in my mind have any affect upon what I was seeking to accomplish.

THE COURT: Now, you referred to other surveys taken by individuals who sold material sexually oriented. How many such surveys, approximately, have you studied?

THE WITNESS: I have prepared a questionnaire that was given to, I think, approximately 12 different outlets, and I do not—I did not get the total compilation on the various questions. But in those that I did compile the figures on, those which I did see, the acceptance was well above 50 per cent. In other words, the public opinion and the feeling of the community standard was that the sex-oriented material was generally accepted in the community and that the community had tolerance for it.

THE COURT: Very well.

Anything further, Mr. McDaniel?

MR. McDANIEL: Just one or two more points, your Honor.

DIRECT EXAMINATION (RESUMED)

BY MR. McDANIEL:

Q How many times have you testified as an expert witness in an obscenity case such as this, sir, in the State of California?

MR. IMHOFF: Object to that, your Honor, as irrelevant.

THE COURT: Overruled.

THE WITNESS: Approximately six or eight.

BY MR. McDANIEL:

Q Is that both in Superior Court and Municipal Court?

A Yes. Including Superior Court, it would be probably a dozen times.

Q Have you also testified in Federal courts?

A Yes, I have.

Q As an expert witness?

A Yes.

Q In rendering your opinions here, do you take into account your knowledge of the opinion samples done by the Presidential Commission as well as your own survey for the Commission, as well as your own personal tour throughout the State which you previously testified to, as well as your own knowledge as an attorney practicing specifically in this field for the past 10 or 11 years?

A Yes. All those factors are taken into consideration in my opinion.

Q Now, what is your opinion—

THE COURT: Just one moment.

Do you have any further questions on voir dire?

MR. IMHOFF: Not at this time.

THE COURT: Do you wish to enter an objection?

MR. IMHOFF: Yes, your Honor. I would object to any opinion testimony by this witness in regard to contemporary community standards or the customary limits of candor, in that the witness does not have the qualifications of an expert in this field for the State of California.

THE COURT: The Court feels that your objection goes to weight and not admissibility. Therefore, the objection will be overruled.

You may inquire, Mr. McDaniel.

MR. McDANIEL: Thank you.

BY MR. McDANIEL:

Q I'll show you first this item classified as People's 1 here, Yum-Yum Magazine.

You've looked at that magazine already, is that right, Mr. Laven?

A Yes, I have.

Q What's your opinion as to this question: Taking the material as a whole, applying contemporary stand-

ards, does that material go substantially beyond the customary limits of candor in the State of California, as a whole, in the depiction or representation of sex, nudity or excretion?

MR. IMHOFF: Your Honor, I would interpose an objection to the way the question is formed. The way the question is formed, it's irrelevant to the issue in the case as far as time is concerned.

THE COURT: As far as time is concerned? Very well, the objection will be sustained.

You may rephrase your question.

MR. McDANIEL: I don't understand what the sense of the objection was.

THE COURT: The date of this complaint is June of 1969.

MR. McDANIEL: Well, I think that it has to be judged by contemporary standards under the law. That is the problem that we've got here.

MR. IMHOFF: May we approach the bench?

THE COURT: Very well.

Will you approach the bench with the reporter, please.

(The following proceedings were held at the bench:)

MR. McDANIEL: I think that we have to judge it by today's standards, as far as I know the law. The law requires that it be considered as of the time that is in issue here which is right now, '71. "Contemporary standards" is the specific language of the Code.

MR. IMHOFF: Your Honor, at the time the crime is committed—in my hypothetical question, I made it very specific, giving the facts under which the alleged crime took place, and where it was sold, when it was sold, to whom it was sold. And defense counsel is—

the question is incomplete and irrelevant as far as this trial is concerned.

MR. McDANIEL: Let me point something out to your Honor. What he's doing is he's going to have to ask you to strike his whole witness' testimony because all his qualification and stuff took place in 1970. So if that's the way he wants to have it, he's going to have to have his whole case stricken.

MR. IMHOFF: So does yours.

THE COURT: All right. Do you have any authority to present? In framing your hypothetical—

MR. McDANIEL: I'll tell you what I'll do. I'll get by it by giving a time scope in the question that covers from the date of the offense to the present time. Would that be okay to do it that way?

THE COURT: Of course, I'll have to rule on that question as it's presented.

Now, frankly, I'm not sure whether, in this particular instance, there are those matters where the date of the offense is controlling.

MR. McDANIEL: The reason they come to contemporary standards is because it's language required by the Supreme Court to make it a constitutional statute, and that's to get past this idea that you can judge it by some pre-existing standard. In other words, the material is before this jury for determination whether it's obscene or not obscene right now. I think that's the time you have to work in. I can prove that to your Honor through cases, but I don't think it's necessary. I think I can frame this question so it will cover the whole time span. But I'm convinced that what I'm asserting is the correct law.

THE COURT: I'll give you an opportunity to rephrase your question. Are you withdrawing the question?

MR. McDANIEL: I'll just rephrase it, yes. But I want to know, you know, because, like I said, you know, his witness I don't think is qualified at all; Mickey Mouse Safeway store survey. But that didn't even take place during the time that this thing took place. So, you know, he can't have his cake and eat it, too, is what I'm trying to get at.

MR. IMHOFF: Well, if it would go beyond contemporary community standards—

THE COURT: Are you withdrawing your question and rephrasing it?

MR. McDANIEL: Sure.

THE COURT: All right. You may proceed.

(The following proceedings were held in open court:)

DIRECT EXAMINATION (RESUMED)

BY MR. McDANIEL:

Q Mr. Laven, keeping in mind this Exhibit 1, the magazine called Yum-Yum, in answering this question, and keeping in mind the fact that this magazine was sold in May, 1969, what's your opinion as to the question of applying contemporary standards, whether or not that magazine goes substantially beyond customary limits of candor in the State of California during the period of time from May, 1969, up through the present?

A In my opinion, it does not go beyond customary limits of candor in the State of California during that period.

Q Is it indeed within those customary limits of candor, sir?

A In my opinion, it is.

MR. IMHOFF: Your Honor, object. That question's been asked and answered.

THE COURT: Sustained.

BY MR. McDANIEL:

Q Now, I'll direct your attention to this pocket book here, People's 2, pocket book called Suite 69 by I. Smithson. I believe you already testified that you've read this particular pocket book previous to coming here to court, sir.

A That is correct.

Q Again, keeping in mind that paperback book, the fact that it was sold in May, '69, what's your opinion on the question of, whether or not that paperback book goes substantially beyond customary limits of candor in the State of California, utilizing contemporary standards to determine that point during the period of time from May, '69, to the present?

A My opinion is that it does not go beyond those limits of candor, customary limits of candor, in the State of California during that period.

Q I see.

Now, you're familiar with the unauthoritative rulings of the United States Supreme Court in the area of First Amendment rights and/or obscenity; is that correct?

A That is correct, sir.

Q Is that book, Suite 69, within the limits of candor as shown by materials ruled upon by that honorable court to be not obscene?

MR. IMHOFF: Object to that, your Honor, as irrelevant. It's not—

THE COURT: Sustained.

BY MR. McDANIEL:

Q All right. I'll direct your attention to—I believe this film is Exhibit 5. Anyway, you've seen this film called Tammy and Danny. I had that shown to you here in court, is that correct, Mr. Laven?

A That is correct. I saw it this morning.

Q Keeping in mind that the film was sold in May, '69, what's your opinion as to whether that motion picture film goes substantially beyond customary limits of candor in the State of California, using contemporary standards to determine that during the period of time from May '69 through the present?

A My opinion is that it does not go beyond those customary limits of candor during that period.

Q Now, do you base those opinions on both your knowledge of the surveys which we've discussed, your personal communications with people, your knowledge of what material has been sold and purchased and the volume of that, and on the other factors in your background that you've testified to, sir?

A My opinion is based upon the items that you mentioned, as well as having been very close to this field for many years and following the development of the field.

Q Sir, is it correct that today there are a great number of extremely sexually explicit materials available for sale and sold throughout this State?

MR. IMHOFF: Object to that, your Honor, as irrelevant.

THE COURT: Sustained.

BY MR. McDANIEL:

Q Now, Mr. Laven, have you had opportunity to converse with psychiatrists, psychologists and other human behavior experts?

A Yes, I have, on many occasions.

Q Have you read the material in the Presidential Commission report relating to the psychological effects of material on people?

MR. IMHOFF: I object to that, your Honor, as irrelevant.

THE COURT: Sustained.

BY MR. McDANIEL:

Q Have you read the material in the Presidential Commission report and in other words, such as the work Sex Offenders by Gebhardt from the Kinsey Institute of Sexual Study, on questions of whether or not something's got a prurient interest, i.e., a morbid or shameful interest in sex or nudity as opposed to a normal interest in sexuality?

MR. IMHOFF: Objection, your Honor. The question is compound, irrelevant.

THE COURT: Sustained.

BY MR. McDANIEL:

Q Have you read the portions of the Presidential Commission's report that discuss the question of interest in sexuality and what is a prurient interest in sexuality?

MR. IMHOFF: Object again, your Honor; same ground.

MR. McDANIEL: This goes to his qualifications, your Honor.

THE COURT: We've already established his expertise.

Do you wish to ask him whether or not in his opinion these items cater to a prurient interest?

MR. McDANIEL: Yes.

THE COURT: Why don't you ask him that question.

BY MR. McDANIEL:

Q Mr. Laven, you've—I believe it's already been established that you've seen these three exhibits, right?

A That is correct, sir, yes.

Q What's your opinion, taking into account these contemporary standards, the average person, the State of California, period of time, May '69 to the present, all those factors—what's your opinion on whether these three items have what's known as an appeal to a prurient interest, i.e., a morbid or shameful interest of the average person?

MR. IMHOFF: Object to any testimony on prurient interest, your Honor. The witness has no qualifications at all to testify as to what appeals to a prurient interest.

THE COURT: Very well.

You may lay your foundation.

MR. McDANIEL: All right.

BY MR. McDANIEL:

Q Now, have you studied authoritative works by behavioral scientists on the effect of sex-oriented material on people?

A Yes. I've read innumerable articles.

MR. IMHOFF: Object, your Honor, as irrelevant.

THE COURT: Overruled.

BY MR. McDANIEL:

Q And have you read the parts of the Presidential Commission's report on these psycho-social effects of erotic material on adult people?

MR. IMHOFF: Objection again, your Honor; same grounds.

THE COURT: Will you read the question, please.

(The question was read by the reporter.)

THE COURT: Was there such a study by the Presidential Commission?

THE WITNESS: Yes, there was such a study, your Honor.

THE COURT: Did you familiarize yourself with the material compiled from this study?

THE WITNESS: Yes, I did. I read the report.

THE COURT: The objection's overruled.

You may proceed.

MR. McDANIEL: Thank you.

BY MR. McDANIEL:

Q Now, based on those factors plus your discussions with psychiatrists and psychologists, what's your opinion, as to whether or not these three items have this prurient appeal to the average adult person?

THE COURT: Just a moment. Have you concluded your voir dire examination on this aspect of the witness' expertise?

MR. McDANIEL: I could keep going on it. I will. I misinterpreted what your Honor had said. I apologize.

THE COURT: I was ruling on the last objection.

Very well. You may proceed.

BY MR. McDANIEL:

Q Have you had discussions with psychologists and psychiatrists regarding this issue of what constitutes a prurient appeal to people in material?

A Yes, I have had many such discussions.

Q For instance, did you talk to Dr. Goldstein about this, Fred Goldstein?

A Yes, I have spoken to Dr. Goldstein.

Q And he's a psychiatrist in Beverly Hills; is that right?

A That is correct.

Q And he's testified as an expert witness in cases like this; is that right?

MR. IMHOFF: I object to that, your Honor, as irrelevant.

THE COURT: Sustained.

BY MR. McDANIEL:

Q Have you discussed the effects, the psychological effects, I guess you'd call it, of material like this with the people who you indicated you had conducted your informal survey, I guess we'd call it, throughout this State—did these issues get into those discussions at all?

A Yes, these issues did arise as part of the discussion.

Q Could you give me an example of how it would have arisen in a given discussion?

A An example of how this would have arisen during such a discussion is that the question would—I have often proposed the question whether or not this appealed to the prurient interest of the average person, as distinguished from the normal interest in sex. And I would—I have described the prurient interest as a shameful or a morbid interest in sex, nudity or excretion.

Q Those conversations were throughout the State, as you previously testified?

A They would develop in the course of those conversations, yes.

Q And have you read behavioral science studies of this prurient appeal question with regard to expressive media, such as books, magazines and films, wherein behavioral scientists have rendered their opinions as to the effect of these on average people throughout this State and, indeed, the United States of America?

A Yes, I have read such articles.

Q Do you base your opinions in part on your knowledge gained by your study of these research sources?

A Yes, I do.

Q And do you also base your opinion on your personal knowledge gained through discussions and interrogations of average people as well as experts in this field?

A I do.

Q And what is your opinion regarding whether or not these materials have this prurient appeal?

THE COURT: Just a moment, please.

I'll give counsel an opportunity to examine on voir dire before the question is answered.

Have you concluded your examination?

MR. McDANIEL: At this point, I believe I have.

THE COURT: All right. You may examine, Mr. Imhoff.

MR. IMHOFF: Thank you, your honor.

VOIR DIRE EXAMINATION

BY MR. IMHOFF:

Q What is your definition of prurient appeal, Mr. Laven?

A Prurient appeal is a shameful or morbid interest in sex, nudity or excretion.

Q Do you get that definition from the California Penal Code?

A It's from that, yes.

Q You said you've read behavioral science studies in regard to—is that effects of material on human beings? Is that correct, sir?

A Well, when you say "material," you are referring to the type of material that we have before us?

Q Yes.

A Which is known as adult material, is that correct, sir? Yes, I have read such articles.

Q And what particular articles have you read?

A One in particular is the report of the University

of Chicago report which was a survey which was conducted by contacting somewhere around seven, eight thousand psychologists and psychiatrists throughout the United States. The response, I think, was better than one-half. That was probably—it's indicated as one of the most comprehensive reports or surveys ever conducted, an attempt to determine the effect of erotic material or adult material upon the individual.

Q And what other articles have you read, sir?

A The Kinsey Report, I think, is somewhat related to this. There is an article—a book by Gebhardt who is a defense counsel in First Amendment rights.

Q Is he a psychiatrist or psychologist, sir?

A No. He's a lawyer.

There were discussions at the—

Q What was the name of that book?

A I don't recall the name of the book. I have read innumerable articles which I can't give you the exact location as to where they may be found, with regard to behavioral aspects of persons who read or view adult material. I have—

Q What in your opinion—I'm sorry.

THE COURT: Have you concluded your answer, Mr. Laven?

THE WITNESS: Well, I've talked to many psychiatrists and psychologists with regard to this subject, as to their opinions.

BY MR. IMHOFF:

Q What in your opinion would be a shameful or morbid interest in nudity, sex or excretion?

A That is a difficult question to answer because, just as it was described by one of the justices of the United States Supreme Court, I would have to see it first before I could have an opinion as to whether it was an appeal to prurient interest.

Q What in your opinion would shameful mean?

A Shameful? Shameful, I think, is something which is disgusting, which is out of the ordinary. It's bizarre.

Q And what would you consider a morbid—

A I think morbid is more related to something in which there's violence involved, blood; relates to excretion. Probably, morbid is tended to relate to the fetishes more so than the so-called heterosexual material.

Q I'm just concerned about your definition of morbid.

A Morbid, I think, is something that—where pain is exhibited, where it is something which gives you a sorry feeling, so to speak, something which is oppressive.

Q Is it your understanding of prurient interest that the material must arouse a person sexually?

A I don't think that the fact—within my definition, that is not the test, as to whether something arouses a person sexually, because I think there are a great number of things which are different than the editorial or pictorial material which we have before us that can arouse a person sexually. So I cannot say that material of this sort, adult material, is the only thing that can arouse a person sexually and therefore is prurient, appeals to a person's prurient interest.

Q Have you ever had any college courses in psychology?

A Well, I took psychology many, many years ago at UCLA, but it's been a long time ago.

Q And how many courses did you take?

A I think I took two psyc courses.

Q And were any of those courses specifically related to sexually oriented material?

MR. McDANIEL: I would object to the question on the basis he doesn't base his expertise on his college training of 40 years ago.

MR. IMHOFF: It goes to qualification.

THE COURT: It goes to weight, not to admissibility. The objection's overruled.

You may answer.

THE WITNESS: Mr. McDaniel is right. It's 40 years ago.

BY MR. IMHOFF:

Q Well, did those courses have anything to do with that subject—

A No, sir. In those days, this problem was not of any great consequence or issue.

MR. IMHOFF: Your Honor, would you please admonish the witness not to volunteer information, to answer the questions specifically?

THE COURT: Very well.

Respond directly to the question, if you will, sir.

THE WITNESS: Yes, your Honor.

THE COURT: You may proceed.

MR. IMHOFF: I have no other questions.

THE COURT: Very well. Your objection is overruled.

You may inquire, Mr. McDaniel.

MR. McDANIEL: Thank you, your Honor.

DIRECT EXAMINATION (RESUMED)

BY MR. McDANIEL:

Q Now,—

THE COURT: The question posed was: Do either of these exhibits, 1, 2 or 5, in your opinion appeal to a prurient interest?

THE WITNESS: In my opinion, they do not appeal to a prurient interest.

BY MR. McDANIEL:

Q Let me ask you this question, Mr. Laven:

It's possible for material, adult material, to appeal to a person's sexual interest or even sexually arouse them without them appealing to what we call a prurient interest; is that correct?

A In my opinion, that is correct. What you are speaking of I would describe as a normal interest in sex, as compared to prurient interest.

Q I see. And with regard to your opinion on whether or not these items have a prurient interest, that applies to the book, the film and the magazine charged, right?

A That is correct, yes.

Q Now, is that opinion supported by the weight of the findings by the research sources that you've indicated you have professional knowledge of?

MR. IMHOFF: Object to that, your Honor.

THE COURT: The objection will be sustained.

MR. McDANIEL: Well,—

THE COURT: It's a fact for the jury to determine.

BY MR. McDANIEL:

Q You base that opinion, anyway, on your knowledge from these research sources as well as your personal knowledge that you've already demonstrated here; is that right?

A That is correct, and my own personal experience and surveys.

Q Now, with regard to all three of these exhibits, do these exhibits have any social importance, sir?

MR. IMHOFF: Object to that, your Honor, as asking for an expert opinion from a nonexpert in that field; no foundation.

MR. McDANIEL: I'll qualify the witness.

THE COURT: The objection will be overruled.

MR. McDANIEL: I'll qualify the witness.

Q Do these items have any social importance, sir?

A Yes, in my opinion they do have social importance.

Q In what way?

A Well, they are what I would describe as educational, in some sense, for this reason: that they're—if I may give my reason.

Q Sure. Please do.

A There are many people in our society that are not informed about sex as they would possibly like to be or they should be. And, consequently, this material does in many instances educate persons as to sex.

MR. IMHOFF: Your Honor, I object to this answer. This witness has no qualifications in education or—

THE COURT: The objection goes to the weight, not to the admissibility. The objection will be overruled.

BY MR. McDANIEL:

Q Do these materials have an entertainment value to some people, sir?

A Very definitely.

Q Do any of these three materials that are before you constitute hard-core pornography?

MR. IMHOFF: Object to that, your Honor. It's irrelevant.

THE COURT: Sustained.

BY MR. McDANIEL:

Q What is hard-core pornography, Mr. Laven?

MR. IMHOFF: Object again, your Honor, as irrelevant.

THE COURT: Sustained.

MR. McDANIEL: I have no further questions.

THE COURT: You may cross-examine.

CROSS-EXAMINATION

BY MR. IMHOFF:

Q Mr. Laven, you testified, I believe, that you've qualified as an expert seven or eight times, is that correct, or was it twelve? I forget.

A Somewhere around that, yes.

Q Are you getting paid a fee to testify here today, sir?

A Yes.

Q And how much of a fee are you getting to testify here today?

A That hasn't been determined as yet.

Q What do you expect to get?

MR. McDANIEL: Well, I'd object to that. That's a matter between counsel.

THE COURT: The objection will be sustained.

BY MR. IMHOFF:

Q And the other times that you've testified as an expert, were you paid then, also?

A On some occasions I have been paid, and on other occasions I volunteered, because on a volunteer basis it was a reciprocal basis—

MR. IMHOFF: Object, your Honor, to any further answer to that question and move it be stricken; nonresponsive.

THE COURT: All right. The objection is sustained. The motion's granted.

BY MR. IMHOFF:

Q Again, I'd like to ask you, sir, how many clients in this area dealing with what you call adult material or sexually oriented material have you defended in the last year?

MR. McDANIEL: I object. That's been asked and answered.

THE COURT: Overruled.

You may answer.

THE WITNESS: You mean myself, personally?
BY MR. IMHOFF:

Q Yes.

A Or my office?

Q Yourself personally.

A Within the last year, probably, in toto, there have been around 60 or more cases, I would say; my best estimate at this time.

Q And in the last year how many cases has your office defended?

A Well, I'm involved in every case that comes into my office.

Q So the total would be 60, 70? Is that what you said?

A Well, when you say, have I represented, if you mean where there have been criminal prosecutions, that is correct. When you say, how many people in this field have I represented, there are people in this field who I represent who could be another 15 to 20 people in which there are no criminal prosecutions against.

Q Well, some people you represent in an advisory capacity; is that correct?

A Yes.

Q In other words, they're movie producers or publishers; is that correct?

A Or they could be printers. They could be distributors. They could be bookstore dealers. They could be movie owners, movie theatre owners.

Q In other words, the substance of your advice is to inform them as to what you think they can get away with in this field; is that correct?

A That is not correct, sir, not as to what they can get away with. The subject of my advice is to what my opinion is as to what is proper, what is legal, what is constitutionally protected. It's never been in the vein of what they could get away with. It is not my purpose or object to advise anybody to ever get away with anything. It's only my purpose to tell them to stay within the law as I believe the law to be.

Q It's true, is it not, that if a lot of these people that you represent, book sellers, distributors, producers—if they went out of business, you'd lose clients and fees, wouldn't you, sir?

MR. McDANIEL: Objection; speculative.

THE COURT: Argumentative. The objection will be sustained.

BY MR. IMHOFF:

Q In your discussions with these people that you said you had discussions with in all these different cities, did you ever find that there was anything in the type of material that you were discussing with them—that there was anything that would go beyond the contemporary community standards?

A I don't quite follow your question.

Q Well, in your discussions with the people in San Diego, South Bay, Los Angeles, et cetera, did you ever find that any of the people that you talked to felt that there was any of this sexually oriented material or adult material that would go beyond their contemporary community standards?

A Yes, you will always find somebody with that frame of mind in a group of people.

Q Well, what type of material would that be?

MR. McDANIEL: I'd object unless it's limited to time and place. It's too ambiguous this way.

THE COURT: The objection will be sustained.
You may rephrase your question.

BY MR. IMHOFF:

Q In your opinion, sir, is there any type of adult, as you call it, material or sexually oriented material that would go beyond the contemporary community standards of the State of California?

A Possibly, yes.

Q What type of material would that be?

MR. McDANIEL: I'd object. That calls for speculation.

THE COURT: Overruled.

You may answer.

THE WITNESS: I would say that there are certain areas in which I feel that the material does go beyond customary limits of candor; that is, in cases where there might be bestiality involved which is something that is not in good taste, where there is something in which there is—sexual relationship in which there is no text or description, some cases where there may be excretion. This, I believe, is a matter of taste. When I say personally, I would have to tell you that in my own opinion I have to relate to the phrase that appeared in a national magazine, in Time; that obscenity is in the eyes of the viewer, because certain people can look at something very, very mild and something that is unquestionably accepted and they will think it's obscene.

BY MR. IMHOFF:

Q Well, here, sir, we're dealing with the contemporary community standards of the average person in the State of California. Is that how you understand the law to be?

A Yes.

Q Now, what type of material, as an expert, sir, do you feel would go beyond the contemporary community standards of the average person in California?

A Well, editorially, I'd say, there is none. Pictorially, when we spoke of magazines of this sort—not of this sort but of magazines, then I would have to say that in some instances, probably, material might go beyond the customary limits of candor of the average person of the State of California, and that's such as I described to you. That would depend upon the material itself. Generally, what you're asking me, I think, is do I think that there is such a thing as hard-core pornography. And I can only tell you that—

MR. IMHOFF: Your Honor, I object to—

THE COURT: The objection is sustained.

MR. IMHOFF: —that part of the answer as not being responsive.

THE COURT: Yes.

Please don't interpret counsel's questions. Just respond to them.

BY MR. IMHOFF:

Q In your opinion as an expert, sir, is there any material that, to the average person applying contemporary community standards in California, would appeal to a prurient interest, a shameful or morbid interest in nudity, sex or excretion?

MR. McDANIEL: I'd object to the question on the ground that it's unintelligible to the witness.

THE COURT: Overruled.

You may answer.

MR. McDANIEL: It calls for speculation.

THE WITNESS: May I have the question again, please?

THE COURT: Would you read the question, please?

(The question was read by the reporter.)

THE WITNESS: I would have to answer that on a qualified answer. I would say that geographically my answer would be Yes, in some instances this would be true. But in general, of the average person of the State of California, I would have to say No.

BY MR. IMHOFF:

Q Well, you realize we are dealing with a state-wide standard, don't you, sir?

A Yes. That's why I specified—

Q On a state-wide basis, you would say that there's nothing that would appeal to a prurient interest to the average person—

A I don't think there's nothing. There probably is some material but not of this nature.

Q Well, I didn't ask you about this, sir. I'm asking if, in your opinion, there would be any—

MR. McDANIEL: Well, he's just answered that question. I'd object to keep going on it.

THE COURT: Overruled.

THE WITNESS: I would say there is probably some material.

BY MR. IMHOFF:

Q Do you have any idea of what type of material that would be?

A I think I mentioned that before, and that would be the type of material that is disgusting, where there is probably excretion or beastiality or other types of—let's say where there are certain types of perversions that are demonstrated.

Q You have limited it to beastiality or—

A No, I have not.

Q Sex with animals plus excretion plus perhaps certain deviant behavior; is that correct?

A. I have not limited it to that. I would have to see the material to make that determination of my own opinion. I can't just speak of it generally. Let's say this: that I think we all have our own tastes. Well, I won't elaborate on my answer. I was instructed not to.

Q What about—

THE COURT: You, may explain your answer, sir, but do not try to interpret counsel's question.

THE WITNESS: No. Well, in explaining my answer, I think that each individual has a different interpretation or fantasy of what they might see, because I might view a certain thing that has no fantasy to me at all.

BY MR. IMHOFF:

Q Yes. But, sir, on a state-wide basis, the average person in California, wouldn't there be certain material to the average person in the State of California that would appeal to a prurient interest that may not to you personally or to me personally or John Doe personally but the average person? Wouldn't there be that kind of material?

MR. McDANIEL: Objection on the grounds that it calls for speculation; that it doesn't supply any meaning, your Honor.

THE COURT: Overruled.

THE WITNESS: I don't think that I can really answer that question with any authority because I don't know. I don't know whether—I do know this: that to the average person the material we have before us, in my opinion, would not appeal to their prurient interest. There is some material, though, that possibly could appeal to the prurient interest, if there be such an interest, of our so-called average person.

BY MR. IMHOFF:

Q In other words, you're saying in effect that you really don't know what the standard is; is that correct?

A No, I'm not saying that I don't know what the standard is, because when I say—when we speak of the average person, I am taking persons from all geographic areas in the State of California. I am taking them of the adult age group, being from, let's say, 18 or 21 years old to however old they might be, the single, the married, divorced.

Q But you are giving your opinion, aren't you, sir, in regard to the average person in the State of California?

A Yes, but I'm just saying that all this type of person comes within the average person. You have to take them all and put them into a pot and mix them up and try and pull out an average person, if you can do that.

Q Then, sir, let me see if I understand you correctly.

A At this time you can't say whether or not there's any material that, in your opinion, would appeal to a prurient interest or shameful or morbid interest in nudity, sex or excretion?

MR. McDANIEL: I'll object. That's been asked and answered.

BY MR. IMHOFF:

Q To the average person in California. In other words, you can't say whether there is any such material or there would be any such material?

THE COURT: The objection is overruled.

A You may answer.

THE WITNESS: Truthfully, I really don't know whether there is such material that would appeal to

the prurient interest of that average person, that mythical person that we're talking about, because if we get that mythical person, who is he or—

BY MR. IMHOFF:

Q You have not found any, is that correct, in your experience?

A I have found people who material might appeal to a prurient interest, but I didn't believe that person to be the average person.

Q In other words, you have found no material in all of your wide experience that, in your opinion, taken as a whole would appeal to a prurient interest to the average person in the State of California, applying contemporary community standards?

A Are you saying, sir, in my experiences?

Q Yes.

A My experiences abroad, yes.

Q I'm saying, as an expert in this field, sir, and all your background experience, have you ever seen any material which, taken as a whole, applying contemporary community standards, appeals to the average person to a prurient interest.

A That is material that is being distributed or generally distributed in the State of California?

Q Yes.

A I would have to say generally, to the average person, my opinion would be that it would not appeal to their prurient interest. It might appeal to their normal interest in sex.

THE COURT: The question posed to you is: Have you ever seen any material that might appeal to such a prurient interest?

THE WITNESS: To the average person, I can only answer that as I did before. And my opinion

would be that I would have to say No, because I don't feel that material that I have seen would particularly appeal to the prurient interest of that average mythical person that we're talking about. There might be some that I haven't seen. I don't know. I don't claim to have seen all the material that might be distributed in the State of California.

BY MR. IMHOFF:

Q I only asked you about what you have seen, sir.

Have you ever seen any material, as an expert, in your—in all your experience and background, have you ever seen any material that, in your opinion, goes beyond the contemporary community standards of the State of California?

MR. McDANIEL: Your Honor, that's been asked and answered three separate times that I've noted.

THE COURT: Overruled.

THE WITNESS: May I have the question, please, Miss Reporter?

(The question was read by the reporter.)

THE WITNESS: My answer is No.

BY MR. IMHOFF:

Q In other words, in your opinion, the standard of the average person in the State of California would be the lowest common denominator; is that correct?

MR. McDANIEL: I'd object to that. That's argumentative.

THE COURT: Sustained.

BY MR. IMHOFF:

Q What about, as you've mentioned before, beastiality or—would you tell us what you mean by beastiality?

A That is relationship between humans and ani-

mals. And I just say that that is a personal situation with me; that I do not regard it—

Q You were giving me a personal opinion in that respect?

A That is correct.

Q Well, now, as an expert, do you think that bestiality graphically depicted would appeal to the prurient interest of the average person in the State of California?

A It might. I can't say for sure. I really don't have an opinion on that.

Q Do you feel that that would go beyond the contemporary community standards of the State of California?

A No.

Q In other words, the average person in the community would find this did not affront the contemporary community standard?

A Very likely, no.

Q What about sadism or a person getting sexual gratification from beating, whipping or humiliating another person?

MR. McDANIEL: Your Honor, I'd object unless this question is limited to: Does he mean photographic pictures of this, a movie of this, a written story of this or what? Because it's meaningless this way.

THE COURT: Very well. The objection will be sustained.

MR. IMHOFF: All right.

THE COURT: Before you proceed, can you give the Court an estimate as to how much longer you will require to complete your cross-examination?

MR. IMHOFF: It will be perhaps 15, 20 minutes. I'm not sure at this time.

THE COURT: All right. Perhaps this might be an opportune time to take our midafternoon recess.

Ladies and gentlemen, you're admonished that you're not to discuss this matter among yourselves nor with anyone else, nor are you to form or express any opinion thereon until the matter is ultimately submitted to you.

Court will be in recess. We'll reconvene at half past 3:00.

You are to report back at that time without further order, notice or subpoena.

(There was held a recess.)

THE COURT: People versus Kaplan.

The record will show the defendant is represented by counsel, the People are represented. Mr. Laven has resumed the witness stand.

You may continue.

MR. IMHOFF: May I have the last question read?

(The testimony was read by the reporter.)

CROSS-EXAMINATION (RESUMED)

BY MR. IMHOFF:

Q Limiting ourselves to the printed word, do you feel that graphic depictions of sadism in printed word would go beyond the contemporary community standards of the average person in the State of California?

A I do not.

Q Do you feel that it would in picture form, like in a magazine?

A No. I feel that it would not.

Q Do you feel that in either one of those forms it would appeal to the prurient interest of the average person in the State of California?

A I do not feel that sadism, including flagellation and bondage, would appeal to the prurient interest of the average person in the State of California.

Q Limiting ourselves to the printed word again, do you feel that acts of incest graphically depicted would appeal to a prurient interest of the average person in the State of California?

A In my opinion, it would not.

Q Do you feel it would go beyond the contemporary community standards of the average person in California?

A I feel it would not go beyond the contemporary community standards in the State of California.

Q In other words, the average person finds this acceptable; is that correct?

A I think it's generally accepted that it exists. I think the average person—

MR. IMHOFF: Would your Honor please admonish the witness to answer my questions?

MR. McDANIEL: Your Honor, he's entitled to explain his answers.

THE COURT: Well, of course, I didn't hear the answer so I don't know if it would be responsive or not.

You may rephrase your question.

BY MR. IMHOFF:

Q Well, in other words, you feel that the graphic depiction of these acts in either books, the printed word or films or magazines is acceptable to the average person?

MR. McDANIEL: I object to that question, the form of the question; improper test, improper coupling of pictorial and printed-word material.

THE COURT: The objection will be sustained.

You may rephrase your question.

BY MR. IMHOFF:

Q Do you feel that in pictorial material, such as a magazine, the graphic depiction of incest is accept-

able to the average person in the State of California?

MR. McDANIEL: Objection. That's not the test.

THE COURT: Sustained.

BY MR. IMHOFF:

Q Do you feel that this would go beyond the contemporary community standards of the average person in California?

A As your original question was framed, I would say that it would be impossible by a graphic description to indicate incest.

Q Are you referring to a picture?

A Yes. You said graphic, sir. Yes, it would be impossible to determine whether it was incest, whether there was a relationship between—if I may explain my answer.

If there is a relationship between a relative or between members of the family, that could certainly not be determined graphically.

Q You don't feel that, by the aid of props, clothing and so forth, it could be indicated that this would be mother and daughter or husband and wife?

A I don't think any props would be able to indicate mother and daughter, father and son or brother-in-law and sister-in-law and so forth. There's nothing by aid of props that could indicate that graphically.

Q Do you feel that in the printed word alone—that a graphic representation or depiction of the acts of incest go beyond the contemporary community standards of the average person in California?

A I can't answer that question when you insert the graphic, because to me graphics are pictorial. If you say the editorial description, sir, then I think I could answer your question.

Q All right. The editorial description.

A In my opinion, it does not go beyond the customary limits of candor in the State of California as to the average person.

Q Do you feel that the act of sodomy in pictorial form would appeal to the prurient interest of the average person in the State of California?

MR. McDANIEL: Your Honor, I'd object to this question on the grounds that the test we're talking about is to take a whole item, whatever it might be, as a whole; and these questions I don't think are relevant or meaningful or supply content because they're asking for isolated commentary which is not relevant to our state-wide tests or our obscenity laws.

THE COURT: Overruled.

You may answer the question.

THE WITNESS: May I have the question, please?

(The question was read by the reporter.)

THE WITNESS: I don't think it would appeal to the prurient interest of the average person, no.

BY MR. IMHOFF:

Q In other words, Mr. Laven, there's very little, if anything, in your opinion that would appeal to the prurient interest of the average person in the State of California, that is, a shameful or morbid interest in nudity, sex or excretion?

A Yes, sir. That is a fair statement.

Q And there is very little if anything, that would go beyond the contemporary community standards of the average person in the State of California?

A There probably might be some things which we talked about before; but, again, going to the average person, it's a question of what their reaction might be to it.

Q What is your opinion of the average person?

A In my opinion, the average person is what I attempted to describe to you before. It is based upon geographical areas, based upon age, based upon sex, based upon their social standards, based upon their economic standards. It's that mythical person that we attempt to identify as the average person. It's a cross-section between all of these things that I might have mentioned. When we say "average," relate to ourselves, we probably all think that we're average. But that's something that plays on words again. When you come close to the average person in the State of California, you have to eliminate certain elements. You have to eliminate the bias and the prejudice, and you have to eliminate the person who is strong in the other direction.

Q What kind of an interest do you think an average person would have in sex?

MR. McDANIEL: Well, I'd object to that. That's not relevant.

THE WITNESS: I can answer that question.

MR. McDANIEL: I'll withdraw the objection.

THE COURT: You may answer the question.

THE WITNESS: Yes, I think the average person would have a normal interest in sex. That seems to be the trend of things and it has been probably forever, that the average person has a normal interest in sex and nudity. I think boy-girl, man and wife is part of that.

BY MR. IMHOFF:

Q You feel that an interest in acts of sadism, masochism, beastiality, sodomy, these are all normal interests in sex?

A No, I don't say that these are normal interests. These are—let's say these interests that you've men-

tioned—they have an interest to a certain segment of our society. But I don't think that the average person is either pro or con about it. They accept it or reject it.

Q Then it's not a normal interest, as you indicate, but then, at the same time, it would not appeal to the average person to a shameful or morbid interest in sex; is that correct?

A May I have the question again?

THE COURT: Would you read the question?

(The question was read by the reporter.)

THE WITNESS: I don't quite understand that question. It's a little bit compound, I think, I'm sorry.
BY MR. IMHOFF:

Q I'll try to rephrase it.

You've indicated that interest in these particular acts is not the normal interest in sex, to the average person; is that correct?

MR. McDANIEL: Your Honor, I'm going to object to this line of questioning on this basis: that what we're talking about is whether expressive media conveys this appeal or does not convey this appeal to the average person. Whether an individual has some type—

THE COURT: The previous question is vague.

You may rephrase your question.

BY MR. IMHOFF:

Q Would the graphic depiction in pictorial form of the acts I've just enumerated show in your opinion a normal interest in sex of the average person?

MR. McDANIEL: Asked and answered 12 times.

THE COURT: Overruled.

THE WITNESS: You are speaking of sodomy, you are speaking of sadism, bondage, flagellism. Those particular concepts are considered to be a fetish to the

average person. Let's say, to the average—to a masochist, let's say that this sort of depiction would not have any prurient appeal, would only have a normal appeal.

BY MR. IMHOFF:

Q We're talking about the average person now.

A The average person—I don't think that it would effect them one way or another, in my opinion. They either accept it or reject it.

Q I didn't ask you if it would effect them, sir.

A It would appeal to—

Q In your opinion, would interest in those graphic depictions represent a normal interest in sex?

A To the average person? It could or could not. I don't think that I can honestly answer that question. It's a little bit vague because of some of the—let's say, some of the average group—it might appeal to their normal interest in sex. And to some of the average person, it might not. But you are asking me—

Q Then you don't have an average person; is that correct?

A Well, no. Well, you have this average person. But when you get into your fetishes, such as you are describing, they are in a different area completely than, let's say, the normal type of activity that is displayed.

Q In other words, none of these facts graphically depicted, in your opinion, as an expert, would appeal to the prurient interest or shameful or morbid interest in nudity, sex or excretion to the average person?

A No.

MR. McDANIEL: That's been asked and answered, your Honor.

THE COURT: This is cross-examination.

THE WITNESS: In my opinion, they would not.

THE COURT: Objection's overruled.

MR. IMHOFF: I have no further questions at this time.

THE COURT: Anything on redirect, Mr. McDaniel?

MR. McDANIEL: I have no questions, your Honor.

THE COURT: Very well. Is there any further need for Mr. Laven's presence?

MR. McDANIEL: May he be excused?

MR. IMHOFF: People will stipulate he be excused.

THE COURT: All right. Thank you for coming, sir. You're free to leave if you wish.

MR. McDANIEL: At this time, your Honor, what I'd like to do is have the jury inspect the exhibits that have already been introduced into evidence as comparable exhibits, and I'd like to start that off with Exhibit—

THE COURT: You do not have a witness standing by at this time?

MR. McDANIEL: No, I do not.

THE COURT: Do you have any objection at this time?

MR. IMHOFF: No, your Honor.

THE COURT: All right. They were B, C, D and E—we have yet to rule on J. We're going to read that. You're reading that. And—well, let's show these, and then we can show the others.

MR. IMHOFF: At this time, would the Court admonish the jury on the admonishments we agreed upon in chambers?

THE COURT: Yes.

As to Defendant's B, the Court has taken judicial notice that the nonobscenity finding was made by the

Appellate Department of the Superior Court which is binding on this court.

As to Defendant's C, you're reminded that this decision was made by the Supreme Court of the United States, which is binding on this court.

As to D and E, this decision was made by the Beverly Hills Judicial District, Municipal Court of that district. You can consider it for its persuasiveness, but it is not binding on this court.

MR. McDANIEL: Thank you, your Honor.

MR. IMHOFF: I believe there was something in regard to writing in one of them.

THE COURT: Yes. In the one magazine—

MR. McDANIEL: Exhibit C.

THE COURT: Yes. You're only to consider for comparison the depictions, photographically, of male and female nudes which would be comparable to what's before us. The photographs of single female nudes or single male nudes are not material as—

MR. McDANIEL: I thought it was the text that was not material.

THE COURT: And the written text. You're not to read the written text.

MR. McDANIEL: I'll pass Exhibit B up to the jury first. That's the two magazines—

THE COURT: Am I confused now as to our agreement as to the Jaybird magazine?

MR. McDANIEL: Well, yes. You only indicate, I believe, that the text was not to be considered, your Honor.

THE COURT: Is that your understanding, Mr. Imhoff? I believe that is correct. I'm not certain.

Well, you see, the text would be integral with—
Would you approach the bench, gentlemen.

(There was a discussion at the bench.)

THE COURT: For the record, the Court is taping pages 14, 15 and 16 together. The jury is admonished not to consider the material on those pages.

Pages 24 and 25 are being taped together, and you're admonished not to consider those.

Pages 31, 32, 33, 34 and 35 are excluded.

52, 53, 54, 55—52 to 55, 60, 61, 62 and 63—

I'll explain to the jury that in Defendant's C we're only concerned with those parts which—of course, the Court is not making this determination for you. It's for you to determine whether or not the material is comparable or whether there are distinctions between the material submitted and the material that is the subject matter of this case. But the Court has excluded from your consideration those matters which the Court has determined have no possibility of being declared as comparable. Therefore, that subject matter would not be for your—would not affect your determination in any way.

MR. McDANIEL: Thank you, your Honor.

I will not hand up Exhibit B. That's two magazines, Eager Beaver and Fluff, which were the magazines held not obscene by the Appellate Court ruling binding on this court. And I ask that each juror look through all of these materials.

And either now or subsequently, may I look these over with an eye toward the issues which we'll obviously be arguing in this case?

THE COURT: Well, the Court will instruct the jury, Counsel. Just give them the exhibits, if you would.

You're to disregard the commentary of counsel.

MR. McDANIEL: Exhibit C.

And the next is The Foxes. That's Exhibit D. And finally Exhibit E, a magazine called Fantastic.

(There was held a recess.)

THE COURT: The case of People versus Murray Kaplan.

The record will show the defendant is represented by counsel, the People are present and represented, the jurors are all seated in their respective places in the jury panel box.

Has everyone seen all of the exhibits?

The record will show that all of the jurors nod in the affirmative.

Very well. Ladies and gentlemen, you're admonished that you're not to discuss the matter among yourselves nor with anyone else, nor are you to form or express any opinion thereon until the matter is ultimately submitted to you.

You're excused at this time and ordered to report back to this courtroom tomorrow morning at 9:15 a.m. without further order, notice or subpoena.

All parties and witnesses in the case of People versus Kaplan are excused and ordered to report back at 9:15 a.m. without further order, notice or subpoena.

(Recess.)

LOS ANGELES, CALIFORNIA,
WEDNESDAY, JANUARY 27, 1971
9:30 A.M.

THE COURT: Case of People versus Murray Kaplan.

The record will show that the defendant is represented by counsel, the People are present and represented. 11 jurors are seated in their respective places in the jury panel box.

We received word this morning that Mrs. Freeman had an unfortunate accident and fell and hurt her foot. And by reason of the Court's admonition which I

thought the jury would have understood was with tongue-in-cheek, although the State has granted me many powers, I cannot declare sickness and accident impossible.

As a consequence, she felt very contrite and wanted to come in this afternoon but indicated that it might cause her discomfort. And as a consequence, we will be forced to recess until tomorrow morning when she will be here. And I hope that all of you will insulate yourself so that you will not contact any flu bugs, and walk very carefully, drive carefully so that we can proceed with the case tomorrow.

You're admonished that you're not to discuss this case among yourselves nor with anyone else, nor are you to form or express any opinion thereon until the matter is ultimately submitted to you. You're excused at this time and ordered to report back tomorrow morning at 9:15 a.m. without further order, notice or subpoena.

(Recess.)

LOS ANGELES, CALIFORNIA,
THURSDAY, JANUARY 28, 1971
9:45 A.M.

(The following proceedings were held in chambers:)

THE COURT: We're talking about proffered Defendant's L, is it?

MR. McDANIEL: The Cine 73 film, and it's—

THE COURT: Which is the one that's the three reels?

MR. McDANIEL: The three-reel film is R—it's P. Exhibit P is what we're talking about.

THE COURT: We're talking about proposed Defendant's P.

All right. You wish to present argument?

MR. McDANIEL: Well, yes your Honor. That film—the Court's seen it. It is a comparable film to the film that's charged in this case, and I think that it's proper to show that to the jury as a comparable in a similar sense to the magazines that they've seen.

MR. IMHOFF: I would object to the admission of this film into evidence. No. 1, there's no record before the Court sufficient to determine whether or not this film was found to be obscene or not. Even if it were in the trial court, it would not be binding in this court, would not be admissible. There's no such thing as a special verdict in California.

THE COURT: This is the Pasadena case?

MR. McDANIEL: Yes.

MR. IMHOFF: There's no way to determine whether or not the jury found this film obscene or what issues they decided. They just found the person not guilty.

THE COURT: Did we get a minute order from—

MR. McDANIEL: What we had was a transcript that showed clearly they found it not obscene.

THE COURT: Yes.

MR. IMHOFF: May I see that? I haven't seen it.

MR. McDANIEL: Here.

THE COURT: We might include these minute orders and copies of findings.

MR. McDANIEL: Of course, the record already would reflect, I believe, that the other film was withdrawn by the defense—

THE COURT: Now, that would be what?

MR. McDANIEL: —after an informal discussion with the judge.

THE COURT: What that Q?

MR. McDANIEL: Clichy was R. That's been withdrawn.

THE COURT: Very well.

MR. IMHOFF: Since this is a not-guilty verdict, we can't speculate on what issues the jury decided the case on, so there's no finding of nonobscenity in this trial court verdict. The film itself is not relevant for that reason. The contemporary community standards which, as I understand 'it, would be the only thing that the film would be relevant with regard to—what one jury may find in the film, another jury may find just the opposite. The film is certainly not comparable, just by the very fact of its length itself. It's a two-and-a-half-hour film. The ten-minute film I have—I think that in itself is such a wide disparity in length that it would not be comparable to the film that I have. And there were other types of acts committed in this film of defense counsel of Lesbianism, group sex, and so forth, that are not present in the film in this case. it's close at all.

The Court doesn't have any authority, in my opinion, for admitting this film into evidence as comparable material. There's no adequate record or anything else.

MR. McDANIEL: I think those arguments would go to the weight of this. But, basically, it is a comparable film. Indeed, it's more candid sexually than the film charged, and yet it's found not obscene. I know that it's really a comparable film. I realize there was a problem with Exhibit R. That's why I voluntarily withdrew that one. But I think counsel's arguments probably go to the weight of the exhibit and are for argument.

THE COURT: Well, the Court has viewed the film. The Court is of the opinion that the depictions in there

could possibly factually be—portions of it would be comparable activity. Portions of it might be beyond, some of it less than. The only question that the Court is concerned about is the significance of the finding. Now, if it's a not-guilty finding, then, of course, we can't take judicial notice of—or speculate as to what the fact finder—what factors the fact finder made the determination—

MR. McDANIEL: I think that the fact they specifically state in the transcript that they found it not obscene is properly before the Court because it's an official transcript of the proceedings, and—

THE COURT: May I see the transcript, please?

MR. McDANIEL: Yes.

MR. IMHOFF: It's a partial transcript; but, also, they read the verdict which was a not-guilty verdict. The comment of the foreman of the jury, I think, could have been an offhand remark. They certainly didn't just decide the issue of obscenity in that trial. They had to decide the other matters.

MR. McDANIEL: Exact and categorical language of the jury foreman is as follows: "As I understood your instructions, we were to pass on whether the film was obscene or not. This is the verdict that you have in front of you, your Honor."

Now, it couldn't be more clear than that.

MR. IMHOFF: I agree they would have to pass on the obscenity of the film. They'd also have to pass on whether or not the man was guilty of knowingly exhibiting it.

MR. McDANIEL: They just passed on nonobscenity. That's what the thrust of the man's statement is there.

MR. IMHOFF: We don't have the record of the

court here in regard to whether or not it was—what the instructions were. You read the last page. You'll see that it's a not-guilty verdict.

MR. McDANIEL: But the whole point is they based it on nonobscenity, and it states that right there in the record, you know. It couldn't be clearer than that.

THE COURT: Does this transcript include the instruction of the court to the jury?

MR. McDANIEL: No, it does not. Actually, we've been over this problem before, and the only question left was to look at the film to see that it was comparable, and it is comparable.

THE COURT: Well, I would make a finding that the film is comparable. But there is this problem. The foreman indicates: "As I understand your instructions, we were to pass on whether the film was obscene or not. This is the verdict that you have in front of you, your Honor."

Now, I can see where you would come to the conclusion that this may have the only issue submitted to them. It's not clear because we don't know what instructions, if any, the court gave. And I would like to know what the instructions were so I can know whether or not this answer is responsive to the instruction.

MR. McDANIEL: Well, I can explain the history of the instructions, and so forth, I think, right here.

First of all, what happened was they were given the whole batch of instructions and any argument, as well as, I believe—in the prosecutor's argument, it was stressed that they would perform their duties as follows: If they determined the film was not obscene, then they would not need to go any farther. They would be able to come back with a verdict at that

point without considering subsequent issues. If they felt that they weren't sure of whether it was obscene or not or felt that it was obscene, then they would go on to to the next step of whether or not the defendant was not guilty because of lack of scienter or some other factor like that. However, they just got to the first step and stopped there and never even considered the rest.

Now, I can prove it by another fortuitous fact because an attorney is right here in the courthouse now who was out there at the time the verdict was taken, my associate, Mr. Brown. He interrogated the jury subsequently and discussed it with the judge. I can bring Mr. Brown in to testify to that effect.

THE COURT: Would you get Judge Fletcher on the phone in Pasadena?

See, a finding of not guilty—there are more instructions—I just want to—if I could be assured in my own mind that this was the only issue, I would—

MR. McDANIEL: Well, it wasn't the only issue, you know, because they had the whole batch of instructions. But what I'm pointing out to you is that the way they decided it was on the fact that the film was not obscene. They didn't get beyond that point. They could have gotten beyond that point but they didn't. That's why we had this transcript prepared, to illustrate this properly, because the language of the foreman is quite clear there, really.

MR. IMHOFF: That's speculation, your Honor—

THE COURT: Well, of course, an answer has no meaning unless it is viewed in light of the question to which it's responding. So I just want to clear that in my own mind. I'm having the clerk call Judge Fletcher, and I will put the question to him directly.

MR. McDANIEL: If I had realized there would be this problem, in taking another step in having a formal affidavit prepared by that jury foreman—

THE COURT: Well, that would certainly be possible.

MR. IMHOFF: Well, I voiced the objection the other day.

THE COURT: Well, I had not—I wanted to see the film to determine the comparability. If it wasn't comparable, then, of course, this question would not have to be resolved.

MR. IMHOFF: Certainly.

THE COURT: But I do feel that it would be comparable. And if, in truth and in fact, this is the clear-cut unambiguous decision of the jury, the Court will permit the introduction of the film.

MR. McDANIEL: Would it be helpful for me to bring Mr. Brown in here to testify on this point?

THE COURT: Well, I'm not going to limit you on your foundational introduction. Perhaps so. But well—this would be a hearing that would be outside the scope of the jury.

MR. IMHOFF: Your Honor, the record itself is what we have to go on, the record of the court—I mean the transcript of the trial, the record before you, and not, you know, speculation of counsel as to what the jury determined or didn't determine.

THE COURT: The minute order—

MR. McDANIEL: The minute order by itself in a case like this, I don't think would be sufficient. That's why I brought this transcript.

THE COURT: Yes. The minute order in itself would have precluded us from even viewing the film. But I do think that the actual proceedings can be looked to.

MR. McDANIEL: Well, perhaps Judge Fletcher can throw some light on this because he was, of course, there when they came back with a verdict, and so forth. And I remember there was a kind of a problem that arose because they just came back with one verdict, and there were actually two defendants in the case. And there was a question of why they did that. And that was because they had found the film not obscene, not because they had gone to separate questions of guilt or innocence. They didn't get that far because they found it not obscene. But they might have found one of the defendants guilty and one not guilty. Those problems didn't come up. But I suspect Judge Fletcher would be able to clarify that.

THE COURT: He says it was a straight not-guilty verdict. They did not submit the sole question of obscenity; that the jury was polled in the hallway by the lawyers who reported to him that some felt the film was obscene and some felt the film was not obscene; and that they were somewhat complicated instructions, and this and that and the other. But he said this particular—they didn't rule on the question of obscenity but on the total quantum of guilt or innocence.

As a consequence, the Court will reject the offer—

MR. McDANIEL: Well, could I continue my offer by bringing in Mr. Brown to testify right now?

THE COURT: Well, I got Judge Fletcher's personal statement. I would accept it.

MR. IMHOFF: I think the testimony of Mr. Brown would be hearsay. It would be incompetent. I mean, the record, as I say, speaks for itself. That's the only competent evidence on the issue.

THE COURT: But that's exactly what Judge Fletcher said to me, so I don't know whether that was

a voluntary statement on the part of a foreman or what. But he said that that sole issue was not presented. So we cannot conclude from a finding of not guilty that the jury found the material to be not obscene. It would be one of the issues, but we do not know what the—

MR. McDANIEL: Well, would you give me about a five-minute break, then? I'd like to make a phone call myself and talk to my associate for a minute. I don't want to give up that easily on the matter.

THE COURT: All right. Certainly, I'll permit you to do so.

(There was held a recess.)

THE COURT: Judge Fletcher has acknowledged that the foreman did say what the transcript says, and I don't doubt that. I never doubted that. But from the circumstances as related by Judge Fletcher, it would appear to be a voluntary statement which may or may not have significance. It could have been a slip of the tongue. It could have been a misunderstood response. But Judge Fletcher has told me that he did not submit this one question to the jury; that they were given the complete spectrum of instructions with regard to the obscenity cases; that they were not called upon to make this one determination; that the verdict was of not guilty; that they were instructed as to knowledge and all of the other aspects of a criminal case plus the specific instructions with regard to obscenity matters; and that the jury afterward made the—on being examined by counsel, made the statements that I've previously indicated for the record, to wit, some felt it was not obscene; some felt it was obscene.

MR. McDANIEL: Before your Honor rules, may

I beg the Court's indulgence to have brief testimony by Mr. Brown? I really am concerned about this point. It won't take more than five minutes. But I would beg the Court's indulgence in that regard.

THE COURT: All right. Well, then to have everything before the Court, will you stipulate that if Judge Fletcher were duly called, sworn and testified, he would indicate as I have indicated to you with regard to his statements over the telephone?

MR. McDANIEL: Yes, sure.

THE COURT: Will you join in that stipulation?

MR. IMHOFF: Yes, your Honor.

THE COURT: All right. You may introduce the testimony of Mr. Brown.

MR. McDANIEL: May I be excused for a moment?

THE COURT: Certainly.

(There was held a recess.)

(The following proceedings were held in open court:)

THE COURT: The case of People versus Murray Kaplan.

The jury will be excused until 1:30. You're ordered to report back at 1:30 p.m. without further order, notice or subpoena, and you're again admonished that you're not to discuss this matter among yourselves nor with anyone else, nor are you to form or express any opinion thereon until the matter is ultimately submitted to you.

The activities which we're engaged in now, depending on the outcome, will either substantially lengthen or substantially shorten the presentation. So we must resolve these matters outside your presence.

(There was held the noon recess.)

LOS ANGELES, CALIFORNIA,
THURSDAY, JANUARY 28, 1971

1:50 P.M.

(The following proceedings were held in chambers:)

THE COURT: For purposes of the record, we're presenting argument on whether or not Defendant's J shall be presented to the jury.

You may proceed.

MR. IMHOFF: Well, first of all, my objection would go to the fact that the book was reversed on Redrup versus New York. And Redrup versus New York is no authority for setting down—laying down any tests of obscenity. I don't—in my judgment, there was no specific finding of nonobscenity on the Redrup reversal. Therefore, I don't think it could be admissible. Even if we were to assume that there was, there is no indication or finding by the Court on which elements or which reasons they would find it not obscene, and I think that's very important for its relevance as far as contemporary community standards are concerned.

My other objections are to the fact that the book is not comparable to the book that is in evidence—in issue in the case. I think the book that's in issue is far more explicit. It has one sex act after another. It's more gutter language, more of the rank, lewd-type descriptions. There aren't as many sexual experiences in the book defense counsel is proposing, and they are fewer and more far between, and they are not—the book is not written in the same vein. It's a much better-written book, has much more of a plot, a story line than the book that's in evidence. And I don't see as to where they are comparable.

THE COURT: All right.

Mr. McDaniel, do you wish to respond?

MR. McDANIEL: Well, yes, your Honor. I think counsel's arguments would go to the weight, again, and it would be for argument. The book is comparable in the sense that it deals explicitly and graphically with sexual episodes of all sorts and uses all the terminology in describing those activities to great deal. It's, I think, far to say that it is indeed a comparable book, and I think that—that's all the needs to be said about it.

THE COURT: Well, the point that you raised, which I think is an interesting point, the fact that the prosecution took place in New York and that the finding would not comprise a State standard in California and that it might be—however, the Court finds that the Redrup case does, in fact, rule that the material is constitutionally protected. The Supreme Court has hinted that there is such a thing as obscenity. And the ruling of the Superior Court, even though it involves a publication prosecuted in New York, would be binding as being constitutionally protected, by reason of its non-obscenity character in California as well.

It is true, as you point out, Counsel, that it appears that this book Adam and Eve is better written, that the sex acts—it's not as gross or base, not quite as gross or base, as Tammy and Danny—Suite 69. However it is depiction in the main of the activities contained in Suite 69, and I think that counsel's point that your argument goes to the weight and not admissibility is correct, and the distinctions between the two works would be the subject matter of argument. I think it gives the jury a point of comparison on this question of community standards.

And for that reason, the Court will permit the—will receive the exhibit and permit it to be read to the jury.

MR. McDANIEL: Thank you, your Honor. I would like to start the reading off now. I'd like to take a moment to bring in my reader and introduce him to the Court, if I may. He's an attorney at law.

MR. IMHOFF: I will have objection.

THE COURT: Your objection is noted. Do you wish to enter further objection to the introduction at this time?

MR. IMHOFF: Well, yes, I—

THE COURT: All right. The Court will withdraw its ruling to permit you to—

MR. IMHOFF: I will object on the bases already made. There's no foundation for its admissibility.

THE COURT: It's the subject matter of that particular case, which ruling by the Supreme Court is binding on this Court.

Very well. The objection will be overruled. The previous ruling is reinstated.

(The following proceedings were held in open court:)

THE COURT: Case of People versus Murray Kaplan.

The record will show the defendant is represented by counsel, the People are present and represented, the jurors are all seated in their respective places in the jury panel box.

Would you swear the next witness.

MR. McDANIEL: Before you do that, your Honor, I would ask you to indicate to the jury that you've taken judicial notice of this next exhibit and that it will be read.

THE COURT: The exhibit which will be read to you is Defendant's J entitled Adam and Eve. And you are instructed that the Supreme Court of the United States in the case of Hoyt versus Minnesota has found that the material contained in this volume is constitutionally protected and is not obscene. This decision is binding on this Court. The question as to whether this book is comparable to the exhibit entitled Suite 69 which was read to you earlier is a question of fact which you must determine; and whether or not Suite 69 goes beyond the standard of this book is for you to determine.

Very well.

MR. McDANIEL: Your Honor, I will call, as my reader for the book Adam and Eve, Mr. Burton H. Barnett to the stand.

THE COURT: Would you swear the witness, please.

BURTON H. BARNETT,

called as a witness by and on behalf of the defense, having been first duly sworn, was examined and testified as follows:

THE CLERK: Would you state your name for the Court, please.

THE WITNESS: Burton H. Barnett, B-a-r-n-e-t-t.

DIRECT EXAMINATION

BY MR. McDANIEL:

Q Mr. Barnett, state your occupation, please.

A I'm an attorney.

Q And were you approached by me to read the book Adam and Eve to the jury in this case, sir?

A Yes, I was.

Q I will now ask you to begin reading the work.

It is necessary, Mr. Barnett, to start off and read the entire text, including the cover page, and then going directly through.

(The book was read to the jury.)

THE COURT: This might be an opportune time to take our midafternoon recess.

Ladies and gentlemen, you're admonished that you're not to discuss this case among yourselves nor with anyone else, nor are you to form or express any opinion thereon until the matter is ultimately submitted to you.

Court will be in recess. We'll reconvene at a quarter after.

You're ordered to report back at that time without further order, notice or subpoena.

(There was held a recess.)

THE COURT: Case of People versus Murray Kaplan.

The record will show that the defendant is represented by counsel, the People are present and represented, and Mr. Barnett has resumed the witness stand.

All right. On Chapter 5 you may proceed.

(The book was read to the jury.)

THE COURT: We're up to Chapter 9.

Very well. Ladies and gentlemen, we'll recess for the day. You're again admonished that you're not to discuss this matter among yourselves nor with anyone else, nor are you to form or express any opinion thereon until the matter is ultimately submitted to you.

You're excused at this time and ordered to report back to this court tomorrow morning at 9:15 a.m.

(Recess.)

LOS ANGELES, CALIFORNIA,
FRIDAY, JANUARY 29, 1971 9:30 A.M.

(The following proceedings were outside the presence of the jury:)

THE COURT: Case of People versus Murray Kaplan.

The record will show that the defendant is represented by counsel, the People are present and represented.

It's the Court's understanding, Mr. McDaniel, that you wish to present some evidence of a foundational nature out of order at this time?

MR. McDANIEL: Yes, I do.

THE COURT: All right. You may proceed.

MR. McDANIEL: Defendant calls Paul LePage to the stand.

PAUL J. LePAGE,

called as a witness by and on behalf of the defense, having been first duly sworn, was examined and testified as follows:

THE CLERK: Would you state your name for the Court, please.

THE WITNESS: Paul J. LePage, L-e-P-a-g-e.

DIRECT EXAMINATION

BY MR. McDANIEL:

Q Please state your occupation, Mr. LePage.

A I'm a business manager for General Electric, Space Division.

Q Were you the foreman of a jury in a trial recently concluded in the Municipal Court of Pasadena Judicial District, said case titled People versus Cine 73, Incorporated, and Stanley Hurst Smith, No. M-94558?

A Yes, I was.

Q In that case, was a verdict rendered on January 5, 1971?

MR. IMHOFF: Object to this testimony, your Honor, as irrelevant.

THE COURT: Will you make an offer of proof, Mr. McDaniel?

MR. McDANIEL: Yes.

My offer of proof is that Mr. LePage will testify as to the basis for their finding that the film involved is, indeed, not obscene and within customary limits of candor, and that that was the basis for their decision.

MR. IMHOFF: I would object, your Honor. This witness is not competent to testify to impeach the verdict of the jury.

MR. McDANIEL: It's not attempting to impeach any verdict, your Honor, at all.

MR. IMHOFF: The record speaks for itself. There was a not-guilty verdict returned in the matter, and any testimony other—along those issues would be irrelevant, would be hearsay.

THE COURT: What I'm concerned about is the question of whether or not we can go behind the minute order and the jury verdict sheet and whether or not we can go behind the responsiveness of the jury to the total instructions given.

Do you wish to address yourself to those questions?

MR. McDANIEL: Well, certainly. I'm calling Mr. LePage as a witness in this case, and he has pertinent testimony as to an exhibit which is quite relevant to this case, being the motion picture film which was found not obscene in the case in which he was the jury foreman. And it's extremely relevant, and it's perfectly proper and I can bring in this information because the determination of that jury is certainly something that can be gone into in a hearing such as this.

THE COURT: Well, you're not responding to the questions the Court posed. The question is, what authority do you have for going behind the stated verdict, as signed by the foreman, and the docket sheet?

MR. McDANIEL: I guess I don't understand your question because I don't see this as going behind the verdict.

THE COURT: The docket sheet shows a finding of not guilty. The jury verdict sheet shows a verdict of not guilty. We're not attacking that particular verdict, you see.

MR. McDANIEL: No. What we're talking about is the motion picture film which I'm attempting to introduce as a comparable exhibit in this case. And this testimony is quite pertinent as to the basis or legal status of that film. And it's not as clear as it could be from that. The transcript which I offered to your Honor previously helps to supply that reasoning. And I've asked Mr. LePage to come down here because, this way, we can clarify once and for all what that exact determination was. I think we have every right to go into that on a First Amendment proceeding. There is no case law which proscribes such activity at all, your Honor, and particularly where First Amendment rights are concerned the law jealously safeguards those rights.

THE COURT: Well, that still doesn't respond to the issue presented by the Court.

MR. McDANIEL: Which is—I don't quite understand—

THE COURT: Which is, you're seeking to go behind the stated verdict, the official stated verdict in another case, and, well, in some ways, I guess, you're trying to impeach that verdict. The verdict was not guilty.

MR. McDANIEL: I'm not trying to impeach that verdict at all. What I'm talking about is a piece of evidence which was involved in that case as the main piece of evidence, a film prosecuted for obscenity. And I'm attempting to introduce it here. And what I'm attempting to do by this testimony is prove up the legal status of that film because that's not as clear as it could be from the finding of not guilty. I'm not trying to impeach that verdict because that was the verdict that was rendered. What I'm trying to get at is what was the decision on the motion picture film that was involved in that case because that was part of the case, perhaps the main part. As a matter of fact, that's the only part the jury ruled upon. But I have every right to prove that up. And I don't see where that's impeaching the verdict at all. It's merely clarifying what the thrust of that verdict was. If there had been a special verdict available for this case, then the—there would have been a special verdict of nonobscenity. However, we don't have special verdicts available for cases of this nature, and so I must go in this direction to prove up the underlying substantive fact. I don't see any other way that it can be done.

THE COURT: The Court will permit the testimony.

You may proceed.

MR. McDANIEL: Thank you, your Honor.

MR. IMHOFF: People will object.

THE COURT: The objection is noted and overruled.

You may proceed.

BY MR. McDANIEL:

Q Mr. LePage, did that case involve a prosecution of a motion picture film which was a three-reel film

and which is the film that was shown at the Cine 73 Theatre on the date in question in that case?

A I believe it was, yes.

Q Now, that film is Exhibit P in this case, and that film was shown to the jury in the Cine 73 case, is that correct, by the prosecution?

A Yes, it was.

Q Now, after the jury heard all the evidence in that case and was instructed on all points of the law, it then retired to deliberate and render a verdict, is that correct, Mr. LePage?

A Yes.

Q You were elected as foreman by the jury when you retired to deliberate?

A Yes, I was.

Q Now, then the jury decided that the motion picture film was not obscene; is that correct?

MR. IMHOFF: I'll object to that, your Honor, as hearsay evidence. It's an attempt to impeach the verdict of not guilty in the case. The issues were decided—

THE COURT: It's leading and suggestive. The objection will be sustained on that ground.

BY MR. McDANIEL:

Q What was the verdict that the jury came back with in this Cine 73 case?

A Well, following the instructions of the—

THE COURT: Just respond to the question. What was the verdict—

THE WITNESS: Not guilty.

BY MR. McDANIEL:

Q Now, in determining that issue, did the jury consider the point of whether or not the film was obscene or not obscene and nothing else?

A Yes.

MR. IMHOFF: Object to that, your Honor, as irrelevant, leading and suggestive.

MR. McDANIEL: It's certainly not irrelevant and it's certainly not leading.

THE COURT: Overruled.

You may answer the question.

THE WITNESS: Yes, we did.

BY MR. McDANIEL:

Q What was the jury's decision on the question of whether the film was obscene or not obscene?

MR. IMHOFF: Object to that, your Honor, calls for hearsay.

MR. McDANIEL: He's the foreman of the jury.

THE COURT: Overruled.

You may answer.

THE WITNESS: We found the film not—to be not obscene.

BY MR. McDANIEL:

Q To be not obscene?

A Not obscene.

Q Did the jury in the Cine 73 case find that the film was within the customary limits of candor of the State of California, using state-wide standards?

MR. IMHOFF: Object to that, your Honor, as irrelevant, incompetent; calls for hearsay.

THE COURT: Overruled.

You may answer.

THE WITNESS: Yes, we determined it was within the customary limits of candor.

Can I expand on that a little bit, your Honor?

THE COURT: Just respond to questions, please, Mr. LePage.

BY MR. McDANIEL:

Q Now, as a result of that finding, the jury was able then to determine that the film was not obscene, correct?

A Yes.

MR. IMHOFF: Object, your Honor; leading and suggestive.

THE COURT: Sustained.

Mr. McDANIEL: Well, it's already been testified to that they found the film not obscene.

THE COURT: The objection is to the form of the question which has been sustained.

MR. McDANIEL: All right.

BY MR. McDANIEL:

Q As a result of that determination that the film was within the customary limits of candor, what was the jury able to conclude with regard to the film?

MR. IMHOFF: Object, your Honor. It's been asked and answered.

THE COURT: Sustained.

MR. IMHOFF: It's been testified it was found not obscene.

BY MR. McDANIEL:

Q Now, it's also true perhaps that there was a failure of proof on the other elements of obscenity, is that correct, as far as the jury was concerned?

MR. IMHOFF: Object, your Honor; leading and suggestive, irrelevant.

THE COURT: The form of the question is objectionable.

MR. McDANIEL: I'll just go on to something else then.

THE COURT: You may ask the question in interrogatory form without suggesting an answer.

BY MR. McDANIEL:

Q Mr. LePage, after the jury determined that the film in question, which is Exhibit P in this case, was not obscene, did they find any necessity to deliberate further on any other issues?

A No, we did not.

Q Because of the finding of not obscene of the film, did the jury then, because of that alone, render its verdict of not guilty?

MR. IMHOFF: Object, your Honor; calls for a conclusion; irrelevant.

THE COURT: It would be conclusionary. The objection will be sustained.

BY MR. McDANIEL:

Q As a result of finding that the motion picture film was not obscene, what did the jury then do?

MR. IMHOFF: Object again, your Honor. All this calls for hearsay evidence on the part of this witness. Other jurors are not here. I don't have a chance to cross-examine them on their testimony or what they said, what they knew.

THE COURT: Overruled.

You may answer the question.

THE WITNESS: I'm sorry. Could you repeat that?

BY MR. McDANIEL:

Q Yes. As a result of finding the film not obscene, what did the jury then do?

A We let the judge know that we had reached a verdict.

Q And was was that verdict?

A The verdict was not guilty. We could not—

MR. IMHOFF: Object, your Honor; nonresponsive.

THE COURT: You may explain your answer.

THE WITNESS: Okay. We didn't feel that—since

we determined that the movie was not obscene, we didn't see how there could be any guilt on the part of the two defendants, so we said Not Guilty.

BY MR. McDANIEL:

Q I see. Thank you, Mr. LePage.

MR. McDANIEL: I have no further questions.

THE COURT: You may cross-examine.

CROSS-EXAMINATION

BY MR. IMHOFF:

Q When you made this decisions, you followed all the instructions of the judge, did you not?

A To the best of our ability, we did, yes.

Q And you also had to consider, did you not, whether or not he sold the material or whether he distributed it or whether or not he knew, had knowledge

MR. McDANIEL: Objection; multiple and compound.

THE COURT: Objection sustained.

You may rephrase your question in its component parts.

BY MR. IMHOFF:

Q You also had to consider whether or not he had knowledge within the law, did you not, sir?

A We didn't go that far with the deliberations. Once we determined that the movie was not obscene, it didn't seem to us to matter how—what this—

Q Weren't there other jurors, sir, in the jury room who felt that it was obscene?

MR. McDANIEL: Objection; argumentative, leading.

THE COURT: Overruled.

THE WITNESS: Well, we—we took four hours to deliberate, as I recall, roughly four hours.

THE COURT: Listen to the question and respond to the question.

Would you read the question to the witness, please?

(The question was read by the reporter.)

THE WITNESS: Eventually, no.

BY MR. IMHOFF:

Q Well, when you took your notes, as you say, wasn't that polling that you look for a verdict of guilty or not guilty?

A Yes, we did—we took votes.

Q For guilty or not guilty; is that correct?

A Yes.

Q So then you don't know whether the jury, when they were voting for guilty or not guilty, were voting on the issue of obscenity or on the issue of knowledge or on the issue of whether it was sold or exhibited; isn't that correct?

A All of the discussion had been with respect to the film. So, as foreman, I assumed that this is what we were voting on. And, as a matter of fact, I deliberately stated that this is what we were voting on, whether the film was obscene or not.

Q The votes which counted they were for not guilty, is that correct, were on the issue of guilty or innocence?

MR. McDANIEL: I'd object to the question. It's arguing with the witness.

THE COURT: Overruled.

You may answer.

THE WITNESS: Well, that's the only way we had—that's the way we decided we would cast our ballots, guilty or not guilty, to determine whether the film was either obscene or not obscene. Rather than write "obscene" or "not obscene," we wrote "guilty" or "not guilty."

BY MR. IMHOFF:

Q You can't say at this time whether the other jurors were voting on the issue of obscenity or voting on the issue of knowledge or voting on the issue of whether it was sold or distributed; is that correct?

A To the best of my knowledge, ability, all of us were voting on the common issue of obscenity.

Q You were assuming that's what they were voting on; is that correct?

A Well, we specifically stated that in our deliberations, that this is what we were considering.

MR. IMHOFF: I have no other questions.

THE COURT: Very well.

MR. McDANIEL: I have no questions.

THE COURT: All right.

May Mr. LePage be excused?

MR. McDANIEL: Yes.

THE COURT: Join in the stipulation, Mr. Imhoff?

MR. IMHOFF: Yes.

THE COURT: Thank you for coming, sir. You may leave if you wish.

Very well. Do you wish to present argument, Mr. McDaniel?

MR. McDANIEL: Well, yes, your Honor. The testimony of Mr. LePage is extremely clear-cut that the decision, the only decision, made was that the film was not obscene, further clear-cut testimony that the decision was based on the finding that the film was within customary limits of candor, therefore not obscene. The record here supplied speaks for itself, your Honor. It's crystal clear as to what the basis of that decision was. And this Court has already ruled that the motion picture film involved in that case is a comparable film to the film charged in this case.

I think, on the state of this record, that this Court has the duty to allow this film to be introduced as evidence for the defense in this case. It's absolutely crystal clear at this point.

MR. IMHOFF: Your Honor, there's absolutely no authority for the proceedings here today. Everything this witness has testified to is merely hearsay evidence. The record speaks for itself. It's a not-guilty verdict. What counsel here is really attempting to do is impeach the verdict of the jury and make it a special verdict which it was not. And the witness has testified, actually, he was assuming that's what they were voting on. We can't go behind and beyond the verdict, a general verdict in California, to determine whether or not—what the issues were that it was decided upon. That irrelevant and incompetent. And the only thing we have here is the word of this one juror. And we have the testimony of the judge—I believe it was Judge Fletcher; is that correct?

THE COURT: That's correct.

MR. IMHOFF: —who testified that—

MR. McDANIEL: He didn't testify at all, Counsel.

THE COURT: There was a stipulation as to his testimony.

MR. McDANIEL: No. There was a stipulation as to what he said over the phone. That wasn't testimony. And he never said anything about what that jury based it on, anyway, other than what the foreman of the jury said, and this was correct, that that's what he said.

MR. IMHOFF: I believe there was a stipulation that if he were called, sworn and testified—that he would testify as to what was said to you over the telephone. I believe that was the stipulation.

MR. McDANIEL: Yes, exactly.

THE COURT: All right. You may proceed.

MR. IMHOFF: And from the statements of Judge Fletcher, the attorneys discussed the matter with the jurors afterwards and talked it over with him, and it was his testimony that some of them felt it was obscene, some of them felt it was not obscene.

MR. McDANIEL: I won't stipulate to that because he didn't—wasn't present in these discussions, and that wasn't what my—counsel who was out there talked to them and found out at all. And we have clear-cut testimony by Mr. Le Page on what the basis was.

THE COURT: Mr. McDaniel, give Mr. Imhoff an opportunity to conclude his comments. It's terribly rude of you to interrupt him every time he opens his mouth.

MR. McDANIEL: I apologize.

THE COURT: You'll be given an opportunity to address this Court. Now, proceed in a professional manner, if you would.

All right. You may proceed.

MR. IMHOFF: I think that the testimony of Judge Fletcher is entitled to great weight in this matter. He was close to the situation right after it happened, when it was discussed with other attorneys. Attorneys had discussed it with jurors. He said that he gave them the full gamut of instructions on 311.2 and that they returned a general verdict of not guilty. And I think we're only speculating as to why, and it's irrelevant anyway as to why they found a verdict of not guilty. You can't lay a foundation for the admissibility of evidence by impeaching—in this manner, trying to impeach the verdict of another jury.

THE COURT: All right. You may respond, Mr. McDaniel.

MR. McDANIEL: Yes, your Honor.

First of all, Mr. LePage's testimony is crystal clear. He indicated that it was the clearly stated basis of their votes that it was limited to whether the film was obscene or not obscene. The reporter can read back that testimony if anybody has a shadow of a doubt as to what he said. He stated that the only issue they determined was that the film was not obscene. They didn't feel required to go further because, once they determined the film was not obscene, that was the end of it. So they were able to render their verdict of not guilty.

The important point is that the basis of that verdict was that the motion picture film was not obscene, specifically because it's within the customary limits of candor. That is not impeaching a verdict. That is merely finding out what the basis for the determination was, which is not impeaching a verdict because the verdict obviously stands. Nobody's trying to impeach the validity of that verdict. The important point, I think, here is that we have sworn testimony by the person most properly in a place to really know what happened, the foreman of that jury, who was in there and led the deliberations during the entire deliberative process of that jury. His testimony here, to me, seems to be overwhelmingly clear. And I would submit that on that basis the question which was perhaps unclear yesterday is completely clear now; that that film was indeed found to be not obscene by this jury and for customary-limits-of-candor reasons which is uncontradicted testimony. That renders the admissibility of this film, in my judgment, beyond question. And I think

that it would be a denial of procedural due process not to allow defendant to use this motion picture film which—it's already been determined to be a comparable film. And I don't see any other possibility than that, your Honor.

THE COURT: Very well. Of course, the Court finds that the general question of guilt or innocence was submitted to the jury based upon instructions covering the entire spectrum of the offense, insofar as the issues to be presented to the jury are concerned. The testimony of this witness as to what the jury did, of course, is within the province of his testimony. His conclusions as to what the other 11 jurors might have thought, of course, would be conclusionary. The Court could not consider that aspect of his testimony. The Court is compelled, by the statements of Judge Fletcher as to what was submitted to the jury—and of course, the actual verdict of the jury is a matter of record, both from the jury verdict sheets and the docket sheets of that case.

As a consequence, the offer is proof is rejected. The films will be excluded.

MR. McDANIEL: Could I ask, on what basis?

THE COURT: I've just explained the basis.

MR. McDANIEL: Well, then, your Honor, I'm going to have to renew my motion to introduce the film that I withdrew which is Exhibit R in this case, and I'm going to offer specific findings of fact that prove that that film was determined to be not obscene by a Federal judge in this state. I think that this amounts to a denial of due process to the defense in this case.

But, anyway, I'm going to go on to Exhibit R and ask that you reconsider Exhibit R at this time which is Quiet Days in Clichy.

This film was determined to be not obscene by a Federal judge, and—

MR. IMHOFF: I would object, your Honor, to these proceedings because—

THE COURT: Mr. Imhoff, I admonished Mr. McDaniel about interrupting you. And I'm going to admonish you about interrupting Mr. McDaniel. Please give him an opportunity to conclude his comments. You can take notes and answer it point by point.

MR. IMHOFF: I'm sorry, your Honor. I didn't mean to be rude or interrupt. I wanted to get an objection on the record to the proceedings before he began, and that was the reason that I interrupted.

THE COURT: You may proceed, Mr. McDaniel.

MR. McDANIEL: Anyway, that was in U.S. versus 10 Reels Motion Picture Film Entitled Quiet Days in Clichy. I've already submitted to this Court the findings of fact and rulings of law prepared by Judge Gray in that case which show that the prosecution was unable to prove that the film went substantially beyond customary limits of candor and that the judge finds the film to be not obscene.

That motion picture film has been seen by this judge. It contains extremely candid sexual activities in the nude between men and women. I want to use that as a comparable film in this case. The test of comparability is whether or not something's been charged with obscenity, whether it deals with sex and nudity. It's not ever that it has to be the same motion picture film as the one charged in the case because that could never be. And so I will submit that film at this time.

THE COURT: Very well.

Mr. Imhoff, you may now respond.

MR. IMHOFF: Thank you, your Honor.

May I ask if there is a copy of the opinion before the Court? Has defense counsel offered—

THE COURT: I'm accepting defense counsel's words, insofar as the opinion. He seems to have a copy of the opinion.

MR. McDANIEL: Well, I had a findings of fact. This is a judgment, and I handed in the—

THE COURT: For purposes of the offer of proof, the Court will accept counsel's representations.

MR. IMHOFF: Well, I would object to this proceedings, to begin with, because the film has been withdrawn previously, number one.

THE COURT: He's resubmitting it.

MR. IMHOFF: Number two, I believe that in that case, your Honor, the Court specifically found that there was—the film had artistic merit, and that was the reason that they found it not obscene. As I recall, reading that, there was—I believe they specifically stated that they did not—that it did go beyond customary limits of candor, beyond the contemporary community standards, or else they weren't deciding that issue. I don't recall. But I think the findings of the court were that the film had artistic merit which was the redeeming social importance that made it not obscene. I don't think there can be any argument that that film is in any way comparable to the ten-minute film of the People. That film had sound. That film had plot and a story. That film went un hour and a half or so. It was a far more sophisticated production. It had obviously some artistic merit to it.

The issue of comparability—I believe the Court has indicated previously that it did not feel that the film was comparable. So I think that the film ought to be rejected as a comparable film to the People's exhibit. That's all.

MR. McDANIEL: I'll respond to counsel's argument by pointing out that counsel engages in evasions, misstatements and improper interpretations based on not even having read the opinion. That's completely improper conduct by counsel. I'd ask that he be assigned for misconduct to those statements, your Honor, first of all.

THE COURT: The motion is denied.

MR. McDANIEL: Number two, that motion picture film was adjudged to be not obscene. That motion picture film deals with sex and nudity. We're not conducting an examination in the critical merits of motion picture film here. I doubt if counsel is any more qualified than I or your Honor to make artistic judgments. We're only interested in whether something's obscene or not obscene, under the First Amendment. And that film was found not obscene. It deals with sex in a more candid and graphic manner than the film the prosecution claims is obscene in this case.

This jury is entitled to be able to see what these decisions are, see the exhibits underlying these decisions. And so I think that that film has to be shown to the jury. I'll submit it on that basis.

THE COURT: Well, the Court finds that Quiet Days in Clichy is not comparable to the film at bar.

Firstly, it has a story content, words and music. The editing of the film has artistic merit. The dialogue or copy has artistic merit. It has a story content to it. It has social messages. Whether you agree with the message or not, it does contain social statements. The film before us is a film in color with no music, no sound, no story content. It appears to be a depiction of pre-fornication sex play and display of genitalia. And for those reasons, I don't think the works are comparable.

And as a consequence, the offer of proof is rejected, and the film will be excluded.

MR. McDANIEL: All right.

At this point I will advise your Honor that I have further evidence to present at the conclusion of reading this book, and I will withhold on that until the book is read. But because of the nature of these rulings, I will not rest my case at that point.

THE COURT: Very well.

(There was held a recess.)

THE COURT: The case of People versus Murray Kaplan.

The record will show the defendant is represented by counsel, the People are present and represented, the jurors are all seated in their respective places in the jury panel box.

You may proceed, Mr. McDaniel.

MR. McDANIEL: I'll call Bob Harris to the witness stand.

ROBERT HARRIS,
called as a witness by and on behalf of the defense, having been first duly sworn, was examined and testified as follows:

THE CLERK: State your name, please.

THE WITNESS: Robert Harris.

DIRECT EXAMINATION

BY MR. McDANIEL:

Q Please state your occupation, Mr. Harris.

A I'm an assistant professor at California State College at Long Beach.

Q Did I ask you to come up to conclude the reading of a book Adam and Eve to the jury in this case, sir?

A Yes, you did.

MR. McDANIEL: May I approach the witness?

THE COURT: Very well. You may approach the witness.

I take it, Mr. Barnett is not able to resume reading the exhibit?

MR. McDANIEL: No.

THE COURT: The Court will permit you to substitute this witness for Mr. Barnett.

MR. McDANIEL: Thank you.

BY MR. McDANIEL:

Q Mr. Harris, I will ask you to start reading from the top of Chapter 9 here which is where we broke off at the recess yesterday afternoon.

(The book was read to the jury.)

THE COURT: Ladies and gentlemen, you're not to discuss this matter among yourselves nor with anyone else, nor are you to form or express any opinion thereon until the matter is ultimately submitted to you.

Court will be in recess. We'll reconvene at ten minutes after. You're ordered to report back at that time without further order, notice or subpoena.

(There was held a recess.)

THE COURT: The case of People versus Murray Kaplan.

The record will show the defendant is represented by counsel, the People are present and represented, the jurors are all seated in their respective places in the jury panel box, and the witness has resumed the witness stand.

Your may proceed.

(The book was read to the jury.)

THE COURT: This would be an appropriate time to recess for lunch, ladies and gentlemen.

You're admonished that you're not to discuss this

matter among yourselves nor with anyone else, nor are you to form or express an opinion thereon until the matter is ultimately submitted to you.

You're excused at this time and ordered to report back to this courtroom at 1:30 p.m. without further order, notice or subpoena.

All parties and witnesses in the case of People versus Murray Kaplan are excused and ordered to report back at 1:30 p.m. without further order, notice of subpoena.

(There was held the noon recess.)

LOS ANGELES, CALIFORNIA,

FRIDAY, JANUARY 29, 1971

2:00 P.M.

THE COURT: Case of People versus Murray Kaplan.

The record will show that the defendant is represented by counsel, the People are present and represented, all jurors are seated in their respective places in the jury panel box. The witness has resumed the witness stand.

You may proceed with your reading, sir.

(The book was read to the jury.)

THE COURT: Perhaps we should give the book to the jury. It appears that the subsequent material is not numbered, from 196 on.

Start off with Juror No. 1 and pass the book down.

MR. McDANIEL: May Mr. Harris be excused, your Honor?

THE COURT: Yes.

Any further need for Mr. Harris' presence?

MR. IMHOFF: No.

THE COURT: Thank you for coming, sir. You're free to leave.

MR. McDANIEL: Thank you, Mr. Harris.

Your Honor, I have a motion with regard to some additional possible films which I'd like to make.

THE COURT: Very well. We'll wait until the jury has looked at the book and have our midafternoon recess. You can bring that matter up at that time.

The record will show that the jury has seen the material.

Ladies and gentlemen, you're admonished that you're not to discuss this matter among yourselves nor with anyone else, nor are you to form or express any opinion thereon until the matter is ultimately submitted to you.

We will resume with the presentation as soon as the motions have been concluded. I can't predict at this time how much time that will take.

Do you think that it would go beyond 15 minutes, gentlemen?

MR. McDANIEL: I don't think so.

THE COURT: All right. We'll reconvene at 3:00 o'clock. You're excused and ordered to report back at that time without further order, notice or subpoena.

(The following proceedings were held in chambers:)

THE COURT: The record will show that the following proceedings are taking place in chambers outside the purview of the jury.

MR. McDANIEL: The next—

THE COURT: Before we proceed, I'll again give you my position in these matters. I want a clear, unambiguous factual determination on the question of ob-

scenity and a determination as to substantial comparability before I'll permit the exhibit to be shown to the jurors.

MR. McDANIEL: I understand. The first request I have here is perhaps a little bit different than that, but let me go through it because this is a request for you to take judicial notice of a decision which was rendered by the Ninth Circuit and then affirmed by the United States Supreme Court. And that's in the case of Pinkus versus Pitchess. It's the case below. The Ninth Circuit opinion is found in 429 Federal Reporter 2d 416.

THE COURT: Do you have a copy?

MR. McDANIEL: I have a copy which I'll hand up to your Honor. The case designation number is No. 24294.

THE COURT: Excuse the interruption.

Now, you want me to look at Pitchess versus Pinkus?

MR. McDANIEL: I believe it's Pinkus versus Pitchess.

THE COURT: What's the citation?

MR. McDANIEL: The official case number in the United States Court of Appeals, Ninth Circuit, is No. 24294. It's a decision handed down by the Ninth Circuit on June 29, 1970.

THE COURT: What's the citation?

MR. McDANIEL: 429 Federal Reporter 2d 416.

Now, subsequently to this decision, which was a finding of nonobscenity on a motion picture film which had been found obscene in the State court, went to the Court of Appeals by way of habeas corpus through the District Court where relief was denied and petitioner appealed, the Court of Appeal held that the film

underlying the case was not obscene. The State took that to the United States Supreme Court who, subsequently, affirmed this opinion without writing their own opinion. And so this is—really stands as the opinion that was adopted by the Supreme Court.

I ask your Honor to read this opinion. And I will ask your Honor to take judicial notice of it.

I'll hand it to you before I—

THE COURT: Have you read it?

MR. IMHOFF: I read it a long time ago. I'd like to read it again.

MR. McDANIEL: There's something in here that's the identical text.

MR. IMHOFF: I may have a copy in my briefcase out there.

MR. McDANIEL: Fortunately, I have a complete copy in the Supplement to the cases starting with that per curiam.

THE COURT: I'll let you check that out. It seems to me, if it was affirmed by the Supreme Court, that there is a ruling which would be binding on this Court.

Do you have the film?

MR. McDANIEL: No. What I'm asking you to do with this one is read the description of the film to the jury from the case opinion on this basis: that that's proper because here I've tried unsuccessfully to obtain the motion picture film. The law firm which handled the case, unfortunately, is in Cleveland, and I've been unable to get any way at all of obtaining the underlying film. So I'm asking you to take judicial notice of it and read the description of the film found not obscene here and affirmed by the Supreme Court to the jury.

THE COURT: Well, I would like to know whether or not we have the same type of genitalia display. It could be substantially comparable. It could not. It just indicates that she simulates sexual satisfaction self-induced.

MR. McDANIEL: Disrobed.

THE COURT: Disrobed. Well, a side view without a display of the genitalia. Of course, I don't know if that would be comparable. I can't make a finding on the basis of that description.

MR. McDANIEL: Well, I think on the basis of the description here that you at least can see, in terms of comparability—first of all, the man was charged with obscenity for this film. He was indeed convicted after a trial in the California courts of obscenity based on this film. Appeals were unavailing, and finally the Federal route proved successful and the film was declared to be not obscene. And it deals with a person nude going through masturbation activities. I think that that's clear enough on its—the face of this opinion that it's comparable in the constitutional sense. I think that it's proper to read the description in the opinion to the jury where the film is unavailable. I unfortunately cannot get a hold of the motion picture film.

MR. IMHOFF: I would object to that, your Honor, as—

THE COURT: I would not be disposed to do it unless I could make a predetermined finding of substantial comparability. I can't say—it may be. I don't know. I can't tell from that description. We have to know the nature and extent of the exposure of the genitalia, the nature and extent of the activity which they describe is self-induced sexual gratification. If it's a side view and if the props are such that you don't get

the graphic display of the nudity, it could be very substantially dissimilar.

MR. McDANIEL: Well, let me hold off on a continuation of this presentation until I have some other matters to go over. I'll try to verify a couple more facts by a telephone call subsequently.

THE COURT: You can't get a hold of the film? It seems to be—it might be in evidence here? Was the evidence ever removed from the court?

MR. McDANIEL: Well, I know that it went to the District Court and to the Circuit Court and—let me just hold off on that for the time being. I will be able to determine something else by a phone call. But I have to say that—

THE COURT: All right. Do we have any further use for the jury today?

MR. McDANIEL: There is a possibility. There are a couple of other matters.

(There was held a recess.)

MR. IMHOFF: Well, on the most recent request of counsel, we're going to hold off on any argument or decision on that until—

THE COURT: I'll give you a chance to check this out.

MR. IMHOFF: I'll hold off on my objections and everything.

THE COURT: I'll give you an opportunity to provide the film or whatever it is he wants to do.

MR. McDANIEL: I've got two other items to offer. First, I will next offer in as a comparable exhibit to the motion picture film charged in this case the following motion picture film. And this is offered in on the basis indicated in *In re Harris* and other cases, including *Noroff*, of an example of a motion picture film

which is available in the State of California and is sold. This is a film where there is no litigation. This was merely a purchased film, purchased from an adult bookstore.

And with regard to comparability, I will make the following offer of proof:

First of all, let me make the offer of proof regarding how and where it was purchased. This motion picture film was purchased in San Francisco on December 26, 1970, at Randy's Book and Magazine Store, 73 Taylor Street, San Francisco. I have the business card of the store, the receipt of purchase of the film which cost \$35, and the motion picture film. The motion picture film is marked as Exhibit S-1. The receipt is marked as Exhibit S-2. The card of the store is Exhibit S-3.

With regard to an offer of comparability, this film is in full color. It depicts in clear graphic detail a man and a woman. The woman is stripped down naked, lies down on a bed, is tied to the bed. The man proceeds to whip the woman with a rope for a period of time. Then he proceeds to disrobe, has an erection, and proceeds to have clear-cut graphically depicted sexual intercourse with the woman. The film is not under prosecution anywhere. It's openly offered for sale and was sold, and comparable films are available, by my own personal inspection, at innumerable locations throughout California including all over Los Angeles County.

I make that offer of proof and offer in as evidence Exhibit S just alluded to.

MR. IMHOFF: I would object to the receipt of this exhibit, your Honor. It is not relevant to prove contemporary community standards. What may be available in the community may very well be illegal. This film we're prosecuting now was available in the

community at one time. In re Harris does not make a provision that you may enter material that is available in the community. In re Harris—at that time we were concerned with a local standard in the community. Since In re Giannini, we're concerned with a state-wide standard. All In re Harris stands for is that you may introduce evidence to prove contemporary community standards. However, I could go out and buy many things in the market that may be illegal and say, well, just because it's available, therefore it's, you know, all of a sudden legal. This may very well violate the Roth standards. We have no proof that it's not being prosecuted anywhere. Hundreds of films like this are being prosecuted. I believe there's a case, the Appellate Department of the Superior Court, which definitely makes it clear that materials purchased in the community are not relevant to contemporary community standards.

I believe I have a copy of it in my briefcase, if you would give me a few minutes to get it.

MR. McDANIEL: May I make an observation in response?

THE COURT: Yes, certainly.

MR. McDANIEL: First of all, if there is such an opinion by the Appellate Department, it cannot overrule a ruling by the California Supreme Court. In re Harris is a California Supreme Court case. Your Honor's already read the case. It classifies three elements of evidence, expert testimony, material purchased in the community, and litigated material. With regard to counsel's argument on Giannini, it doesn't have merit because the relevant community has been classified to be the State. It doesn't really matter that the relevant community at that time may have been classified as something else, although that position was never ruled

upon. It was offered as evidence supportive of what the standards of that community were. And this is offered as evidence supportive of what the standards of the state-wide community are. That's one reason I feel it was more probative to have purchased the film in San Francisco rather than here in Los Angeles.

The *In re Harris* case doesn't distinguish between those three classes of evidence, and it holds that it's a denial of due process of law not to allow defendant to introduce evidence of contemporary community standards.

Again, your Honor is thoroughly familiar with the *Harris* case. That's the basis of my offering.

THE COURT: Well, as I said earlier when you attempted to introduce various magazines on the same theory, as I read the *Harris* case, the Court stated that the defendant was deprived of introducing evidence of community standards and stated the offer of proof made by the defendant as to what evidence he intended to submit. It's this Court's opinion that the fact that somebody has purchased an item does not necessarily establish that item as coming within the contemporary community standards.

The offer of proof will be rejected.

MR. McDANIEL: Could I ask—supplemental authority for this proposition—that your Honor consider the case of *Luros* against United States? That's an Eighth Circuit opinion, 1968, found in 389 Federal 2d 200.

THE COURT: I've read that case in the past. The ruling will stand.

MR. McDANIEL: All right.

I now make the following offer: In the recent case of *People* against *Natali* and *Sullivan* in the San Fran-

cisco Municipal Court, City and County of San Francisco, Judge Harry Lowe, judge presiding, San Francisco Municipal Court, Criminal, Nos. R22045 and R22047, in a decision handed down on January 11, 1971, just some two and a half weeks ago, Judge Harry Lowe held the motion picture film Mona to be a nonobscene motion picture film which is protected by the First Amendment to the United States Constitution.

I offer the film Mona for the jury's consideration on the basis of the fact that it has been found not obscene in a final determination. The case is not on appeal. The motion picture film Mona is a color motion picture film which contains complete genital nudity, male and female, contains complete sexual activity between male and female, graphically depicted, clearly depicted, was found not obscene, and, moreover, has played in Los Angeles County for well over three months without any legal problems whatsoever, is now currently playing at the Eros Theatre on La-Brea. And I offer it in as a comparable exhibit to the motion picture charged in this case on the basis both of its nonobscenity and on the basis of its having played in Los Angeles County as well as San Francisco for many months. I would request that I be allowed to take the jury to the theatre to see the motion picture film.

THE COURT: Well, the Court would require a copy of the docket sheet and/or some memorandum opinion or some proof of the finding. And the Court will have to view the picture before it will submit the matter to the jury.

MR. McDANIEL: Well, let me do this: Let me make this request, then.

I would request that your Honor perhaps see if your clerk can call the Court and get that sent down immediately. If that's not good enough, I can contact an attorney friend in San Francisco and attempt to have a special delivery of that opinion sent down. And I would request that your Honor go with me this afternoon to view the motion picture film. It's on exhibit right now.

THE COURT: Well, it's twenty minutes of 4:00, and I have to get home. I would be happy to do it under other circumstances.

Can you get a copy of the film Monday morning?

MR. McDANIEL: I'll have to have it done at the theatre because it's—it would be impossible for me to get a copy to come in here. I don't own the film or have any rights to the film. And I would make this observation: I would be satisfied, in terms of a viewing of the film, if your Honor were to see it over the weekend. I don't want to cut into your weekend. I know that's a problem.

THE COURT: We're going to be gone out of town all day Sunday. I've got a marriage to perform. I'm going to attend Judge Schaefer's party and the Trial Lawyers Association banquet in the evening. This weekend I just can't get away.

Well, I would suggest that you contact your attorney friend to make sure that it's sent down special delivery. I know that the San Francisco court will not send it down special delivery. If he sees to it, then we'll make sure that it's done.

Why don't you buzz him on the phone right now? In the meantime I'll excuse the jury.

MR. IMHOFF: Do you want me to reserve my objections?

THE COURT: Yes, if you would.

MR. IMHOFF: Until the record's before the Court?

THE COURT: Correct.

(There was held a recess.)

(The following proceedings were held in open court:)

THE COURT: The record will show that in the case of People versus Kaplan the defendant is represented by counsel, the People are present and represented, the jurors are all seated in their respective places in the jury panel box.

Ladies and gentlemen, you're admonished that you're not to discuss this matter among yourselves nor with anyone else, nor are you to form or express any opinion thereon until the matter is ultimately submitted to you.

We're going to have to have some additional out-of-the-presence-of-the-jury conferences and motions and arguments. And since this is Friday—you have been very, very good—we'll let you beat the traffic home.

You're excused at this time and ordered to return Monday morning—that would be February 1, 1971—at 9:15 a.m. without further order, notice or subpoena.

In the case of People versus Murray Kaplan, all parties and witnesses are excused at this time and ordered to report back Monday, February 1, 1971, 9:00 a.m. without further order, notice or subpoena.

Court will be in recess.

(Recess.)

LOS ANGELES, CALIFORNIA,
MONDAY, FEBRUARY 1, 1971
2:30 P.M.

(The following proceedings were held in chambers:)

THE COURT: In the case of People versus Murray Kaplan, the record will show the defendant is represented by counsel, the People are present and represented. The following proceedings are being held in chambers outside the purview of the jury.

Further, for the purposes of the record, the record will show that a number of instructions have been submitted by the People and the defense, that prior to going on the record we have culled through the large number of instructions for purposes of eliminating a number of them from consideration before arguing those that either the Court is prepared to accept or that the defendant—or that the parties think have been wrongfully rejected.

All right. With regard to the general instructions, I take it, nobody has any objection to the general instruction No. 1?

MR. McDANIEL: No.

THE COURT: All right. That will be given.

No. 2 and 3, I don't think anybody has any objection there.

MR. McDANIEL: No.

THE COURT: All right. They will be given.

No. 4 and No. 5. No objection?

MR. McDANIEL: No.

THE COURT: All right.

No. 7. It appears that there's no objection, as to the definition of direct and circumstantial evidence.

MR. McDANIEL: Okay.

THE COURT: All right. No. 9— let's see. 7 has been stricken without objection. No. 8 is being given.

No. 9, the instruction re witnesses and how to evaluate their testimony—

MR. McDANIEL: No objection to that.

THE COURT: That will be given.

All right. No. 10 and 11. No objection. All right.

No. 12. No objection. All right. Those will be given.

Now, as to the mandatory instructions, to be given where applicable. No. 1, we have the presumption of innocence. No objection. No. 2 does not appear to be applicable. No. 3 is being given. All right. No. 4, we indicated there would be an argument.

The instruction reads as follows:

"You are not permitted to find the defendant guilty of any crime charged against him based on circumstantial evidence unless the proved circumstances are not only consistent with the theory that the defendant is guilty of the crime, but cannot be reconciled with any other rational conclusion and each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt has been proved beyond a reasonable doubt. Also, if the evidence as to any particular count is susceptible of two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, it is your duty to adopt that interpretation which points to the defendant's innocence, and reject the other which points to his guilt."

MR. McDANIEL: Now, with regard to No. 4, it is true, your Honor, that circumstantial evidence pervades a case such as an obscenity case in at least the following ways:

First of all, the material that's charged with being obscene itself is material which does not make direct evidence of obscenity or nonobscenity. There must be an inference made. The key inference in the whole case is whether they deduce from all the evidence that these materials are obscene or not obscene. And that itself requires an inference. It's, in other words, not directly provable by just looking at the material. That's one of the reasons that the Supreme Court set out requirements in *Giannini*, among other cases, which require that proof be made on various aspects and then that evidence has to be applied to these materials by inference. That's circumstantial evidence right at the outset of the case.

There's one other area where circumstantial evidence is clearly involved, as clearly as in that first instance, and that is in making an inference whether this man had the requisite scienter. Did he have knowledge of obscenity or did he not have knowledge of obscenity? That can only be inferred from testimony and from deducing or inferring things from what they've heard because there is no direct evidence before them that he had this knowledge at all. And so that's an inference again. It's completely abundantly clear that we have circumstantial evidence throughout the case.

MR. IMHOFF: Of course, we haven't decided yet on the issue of whether or not he had had knowledge of obscenity. We're supposed to get to that instruction, I believe, later.

THE COURT: Well, let's talk about that now because that is the one compelling argument that the defense makes which—

MR. McDANIEL: Excuse me. But even if it was the other thing of obscene character or just character,

that still requires an inference, so that—circumstantial evidence is clearly involved there. Whether the standard is what I say it is or whether it's not, I'm satisfied when we get to that that I can establish that the law in 1969 at the time of this alleged offense was—required knowledge of obscenity.

Counsel I don't think will disagree with that view.

MR. IMHOFF: Well, under the old statute on that issue, the courts never interpreted it to be that the defendant had to know that the material was obscene in the legal sense. In other words, he didn't have to know that it would be held obscene in a court of law. The courts have held that's an impossible standard, even under that old statute. And I think in *Alberts versus California* that was made very clear, that it would be an impossible standard. The cases under the old statute indicate that he has to have, you know, some knowledge of the contents of the material, or you can infer his knowledge from his actions, and so forth, you know, if we're going to apply that statute.

I'm not conceding that point, but I can cite cases which interpret the old statutes, and they do not say he had to know beyond a reasonable doubt it was this and they had to know beyond a reasonable doubt that it was that, and so forth.

THE COURT: Well, are you saying that scienter was an element?

MR. IMHOFF: Well, scienter was an element, yes.

THE COURT: He had to know that the character of the material he was selling—

MR. IMHOFF: Yes.

Well, under the present statute, it says that he has to have knowledge of the character of the material. I believe, under the old statute—

MR. McDANIEL: Just said knowledge of obscenity.

MR. IMHOFF: Yes, but the courts never interpreted that under the old statute to mean that he had to have actual knowledge that this material was obscene. If he had knowledge of some way of the contents of the material or if his—the way he did business, and so forth, indicated that he had knowledge that he was selling this kind of material, that was enough to satisfy that element.

THE COURT: Well, that would be circumstantial evidence.

MR. IMHOFF: Which standard are we going to apply?

MR. McDANIEL: Well, it's circumstantial either way is the point. You have to draw the inference either way.

THE COURT: See, you're showing the type of material that he had available in his store. You're going to impute from his statements that he had knowledge. What's his name?

MR. McDANIEL: Well, Don Shaidell is one of the guys.

THE COURT: Don Shaidell testified that he asked for sexy material, and he advised him what was within the book and the movie, et cetera. This, of course, leads to a conclusion, from what he says, that he knew, which would be circumstantial.

MR. IMHOFF: I think, though, in regard to this, as counsel—counsel made the point that if we apply the 1970 statute as it is now—that it might be an ex post facto application of the law. I believe you must apply the statute in light of the recent court interpretations of that statute.

I think there's one case that I call to mind that may be in point called *In re Panchot* which makes the point that the statute 311.2 must be interpreted in the light of the recent decisions.

So I have a serious question as to whether you apply the old statute, as far as scienter is concerned, or whether you apply the new statute.

MR. McDANIEL: Well, I'm just going to make the flat-out statement that if you apply a statute to this case which was enacted after the commission of the offense, the arrest and the complaint issued, you're walking into a sand trap which I don't think that the Court would want to walk into, and that is *ex post facto* application which is—

THE COURT: Well, we're going on the—

MR. McDANIEL: But as far as circumstantial evidence is concerned, it applies either way, see.

THE COURT: All right. It does appear that we do have a circumstantial evidence aspect on the question of scienter, frame of mind, knowledge. All right. I'm going to give the instruction.

No. 5, character evidence, has been deleted as not applicable.

No. 6, we do have the statements which may be an admission or confession. We have extrajudicial statements on the part of the defendant at the time. So I will give that instruction.

All right. We have the expert testimony instruction. I will give that.

Now, we had the question of—this is not a specific intent section, is it?

MR. McDANIEL: I believe it is, and I'm going to try to show that to your Honor. I've had this problem come up before and was able to establish that it has been classified as a specific intent-type offense.

MR. IMHOFF: I have had this come up before, too, and—in all the cases that I have tried, and the specific-intent instruction has not been given. I think if you read the statute, there's a section in the statute which talks about if he prepares or possesses with intent to distribute, and so forth. If that were the case, if he were just—had it in his possession, did not sell it or distribute, you'd have to prove specific intent to sell or distribute. But the statute goes on to say, "... or who distributes, exhibits," et cetera.

So the only specific intent part of that statute at all would be if you were being prosecuted for possession. I think this was put in there to take into account the Stanley versus Georgia decision which stated that mere private possession was not—could not be prosecuted as a crime. The statute was amended in '69, I think, to include that one particular section. But otherwise it's a general-intent crime.

MR. McDANIEL: The reason that it's a specific intent is because of the scienter requirement, basically, that he had to have the specific intent to violate, as shown, by having to have this requisite knowledge.

MR. IMHOFF: Well, of course, he only had to have knowledge of the obscene character of the material. And the courts have interpreted it that way in the past, even under the old statute, that he did not have to know it was constitutionally obscene or legally obscene. And I can—you know, we can go into cases on that, I think, if it's necessary.

THE COURT: All right. Well, what I can do is this: He must sell items which he knows—

MR. IMHOFF: Knowingly distributing obscenity. That's the three elements in this particular fact situation.

Now, the thing is—

MR. McDANIEL: There's also an intent to distribute which is—

MR. IMHOFF: Well, that doesn't apply, though, here.

MR. McDANIEL: Yes, it does.

MR. IMHOFF: Because he's not being charged with that, really. I mean, the facts indicate that he sold the material.

THE COURT: Okay.

I think what I'll do is this: In the crimes charged in Counts—there are three different counts, right? —I, II and III of the Complaint, there must exist a union or joint operation of act or conduct and criminal intent. To constitute criminal intent it is not necessary that there should exist an intent to violate the law. Where a person intentionally does that which the law declares to be a crime, he is acting with criminal intent, even though he may not know that his act or conduct is unlawful.

All right. I'll give that instruction.

MR. McDANIEL: Well, that's not a specific-intent instruction, and I'd have to object. I want to show you one case on this point, 64 Cal. 2d 816

THE COURT: All right. I think we have a general intent situation.

MR. IMHOFF: Specific intent would be impossible to prove.

THE COURT: Well, let me see the statute or the authority that you have.

MR. McDANIEL: Here's one of the cases, Klor, Panchot.

Here's another point where it's clarified in Burroughs, or a specific intent such as that required under 311.2.

MR. IMHOFF: But, you see, the intent part, your Honor, applies to just what he has in his possession with the intent to do that. But the other—it says, prepares, publish, print, distribute, offers to distribute and—which means—or have in his possession with intent to distribute, and so forth.

MR. McDANIEL: In other words, you got the whole shotgun in your complaint here.

MR. IMHOFF: Well, what he actually did was distribute.

THE COURT: Mr. McDaniel, Mr. Imhoff contends that the statute is severable and that the People are proceeding on the first portion, to wit, "willfully and unlawfully and knowingly send and cause to be sent, bring and caught to be brought into the State for sale and distribution," as opposed to the second portion of the same statute which refers to "have in his possession with intent to distribute and to exhibit and offer to distribute, obscene matter."

MR. McDANIEL: Well, I might point out a couple of factors to your Honor.

First of all, there isn't any evidence purporting to be proof in this case at all that this man brought anything into the State. I don't know why that's—the point that I'm making, they've got a shotgun here. They just laid out every one of the terms under the charging language, and it's impossible to say what's going on because they obviously haven't proven each and every one of these things. I don't know which one they're going on. They haven't elected to clarify that. We demurred to that point in this case without success so that what we're faced with now is a general reading of the statute. And the holdings of the Appellate Courts on intent with regard to 311.2 are clear that it's a specific

intent. That's what both Burroughs and the other case that I handed up, *In re Klor*, discuss. One's California Supreme Court. The other's Appellate Court.

MR. IMHOFF: We can allege the language of the statute. That's perfectly clear by all the cases. And you don't have to prove that he did all of those things. If you prove that he did one of them, you've proved that he violated the statute, if he exhibited or if he distributed, or whatever he did. And so we have proved that he distributed obscene material which is a crime under the statute. It's not necessary to—you can strike the other language of the complaint based on what the evidence shows, I suppose.

MR. McDANIEL: Well, I don't think that it's proper to strike the language of the complaint after the trial is 90 per cent over with. I'd object to that.

MR. IMHOFF: Well, after the evidence is in, whatever the evidence—whichever offense in that statute has been proved. That's the only part that's applicable.

THE COURT: Well, the language of Burroughs, footnote 2, in the interpretation of Penal Code Section 311.2, relating to preparation of obscene matter for distribution, which requires that such preparation be with a specific intent that the material shall be distributed or exhibited, is based on constitutional requirements, et cetera, reading the actual language.

MR. McDANIEL: The specific intent to distribute which has to be proven, and that's one of the elements of specific intent. The other, of course, is the scienter requirement.

MR. IMHOFF: If we were just going on the theory that he possessed it with the intent to distribute, we'd have to probably prove specific intent, but he actually

distributed. And that's the section of the statute that he's guilty of. He distributed the material. There's no specific intent involved there. It's only when you have private possession you have to show an intent to distribute or exhibit, but not when you have actual distribution or actual exhibition of the material, which, I think, the evidence clearly shows.

THE COURT: Well, for sale and distribution, isn't a specific intent—it is a specific intent, is it not?

MR. McDANIEL: It is.

THE COURT: To bring into the State material "for sale and distribution" is a specific intent, is it not?

MR. IMHOFF: Yes, or in this State prepare, publish, print, exhibit, distribute, offer to distribute or have in his possession with intent to distribute, to exhibit, and so forth. The State's case is in this section of the statute; he prepared, published, printed, exhibited or distributed. Okay. He distributed. Any one of these thing constitutes the crime or an element of the crime. So when he actually distributes, there's no requirement of specific intent. He's done the act. It's only when you have possession with nothing more that you have to prove specific intent, as I interpret it.

MR. McDANIEL: That isn't the way the cases interpret it.

THE COURT: This is 311.4 in the Burroughs case.

MR. McDANIEL: What they're talking about is comparing it with 311.2. They're trying to figure out if the intent was the same in 4 as it was in 2, and I think they found out there were different considerations in 4 as in 2. It was a minor-type deal.

THE COURT: Reading the language of People versus Burroughs on 231, fourth paragraph down, the

California Supreme Court has held—and it cites the Klor case—that in a prosecution under Section 311.2 the words prepares, publishes, prints, exhibits, distributes or offers to distribute, as used in the statute, must all be read as modified by the words “with intent to distribute or to exhibit or offer to distribute.” This construction of Section 311.2 was adopted partly because the statute could not constitutionally proscribe the mere preparation of obscene material without any intent to distribute it.

An alternate ground of the Supreme Court's holding in Klor was that the language of 311.2 indicates that the same result was intended by the legislature. Thus, there is no violation of Section 311.2 unless one prepares, publishes, prints, et cetera, the obscene material with the intent to distribute it.

MR. IMHOFF: Yes, your Honor. They talk there about prepare, publish or print. You have to have the intent, but not if you actually distribute or exhibit.

THE COURT: Well, it indicates here, distributes or offer to distribute, as used in the statute, must all be read as modified by the words “with the intent to distribute or to exhibit or offer to distribute.”

So there you are, right there.

MR. IMHOFF: May I see it before you—

THE COURT: Okay. I'll give the specific intent—

MR. IMHOFF: Well, would you wait? I would like to make a phone call, if I could, on this point before you decide because—

THE COURT: All right.

(There was held a recess.)

(The following proceedings were held in open court:)

THE COURT: Case of People versus Murray Kaplan.

The record will show that the defendant is represented by counsel, the People are present and represented, the jurors are all seated in their respective places in the jury panel box.

Ladies and Gentlemen of the jury, you were advised this morning we were going to have a short conference but we would resume the trial. It is true you have been here all day, and the Court will apologize for your inconvenience. By way of explanation, we discussed various ramifications of presentation to be made. I think we've succeeded in cutting down that to a minimum. And we have been going over jury instructions. There are some very sophisticated problems that are presented in this particular matter, and I don't want to go into any specific details. We're going to have to iron out a few more matters, and I don't see how we'll be able to get any further along in the presentation to you today.

Therefore, I'm going to excuse you early at this time and order you to report back tomorrow at 9:15 a.m.

Counsel, would you agree that we will proceed at that time?

MR. McDANIEL: Yes. There will be no problem.

THE COURT: All right. We will do all we can to proceed at that time.

You're admonished that you're not to discuss this matter among yourselves nor with anyone else, nor are you to form or express any opinion thereon until the matter is ultimately submitted to you.

I might further advise you that we have had to go down to the fifth floor library to obtain volumes that we do not have in the library in chambers. That may explain some of the scurrying back and forth that you've observed.

All right. Again, you're admonished not to discuss this matter among yourselves nor with anyone else, nor are you to form or express any opinion on the matter until the matter is ultimately submitted to you. You're excused at this time and ordered to report back tomorrow morning, February the 2nd, 1971, at 9:15 a.m. without further order, notice or subpoena.

(The following proceedings were held in chambers:)

THE COURT: Were you able to complete your call?

MR. IMHOFF: Yes. I just—my position on this matter is still the same. I think if you look at the statute now you will find that the language has been somewhat rearranged so that the distribution part in the statute comes after that intent part. I think the legislative intent in here is not to apply specific intent to someone who possesses—the Klor case was a case of possession. And I think when the Court here in this case, the Burroughs case, talks about the intent, they're really talking about when you possess, prepare, publish, and so forth, and nothing more. When it's actual distribution, the intent is sort of moot. I mean, it's—doesn't apply.

THE COURT: Well, of course, we have to interpret the statute as it existed at the time of the offense. And as a consequence, I am going to give this instruction.

All right. In the crime charged in Counts I, II and III of the complaint, there must exist a union or joint operation of act or conduct and a certain specific intent. In the crime of—

MR. McDANIEL: Disseminating obscene material would probably be—

THE COURT: You're charging him with distributing obscene material?

MR. IMHOFF: Yes. He sold it, which is distributing.

THE COURT: Selling or distributing obscene material—there must exist in the mind of the perpetrator the specific intent to—

MR. McDANIEL: I think you could go to my instruction on that point.

THE COURT: All right. —specific intent to distribute or to exhibit or to offer to distribute said material, and unless such intent so exists that crime is not committed. All right.

So that means I'll give that.

I'm deleting 9. I'm giving 10. I had indicated earlier that we were going to give 9, which is the general intent, but we're deleting general intent. We'll give the specific intent which is 10.

MR. McDANIEL: How does that one go?

THE COURT: That reads: "The specific intent with which an act is done may be manifested by the circumstances surrounding its commission. But you may not find the defendant guilty of the offense charged"—I'm making it "offenses charged"—"unless the proved circumstances not only are consistent with the hypothesis that he had the specific intent to distribute or to exhibit or offer to distribute said material but are irreconcilable with any other rational conclusion. Also, if the evidence as to such specific intent is susceptible of two reasonable interpretations, one of which points to the existence thereof and the other to the absence thereof, you must adopt the interpretation which points to its absence. If, on the other hand, one interpretation of the evidence as to such specific intent appears to

you to be reasonable and the other interpretation to be unreasonable, it would be your duty to accept the reasonable interpretation and to reject the unreasonable."

All right. Now, that bears on this previous instruction, because the reason we gave the circumstantial evidence instruction was on the question of intent. So—

MR. McDANIEL: Well, also on the material, too.

THE COURT: On what?

MR. McDANIEL: On the material, too. I think it still should have to be given, properly. Both of the instructions are somewhat similar, but the point of each is somewhat different. And I think both of them have to be given.

THE COURT: All right. We're giving the instruction as to the distinction between circumstantial and direct evidence.

I'm going to delete 4 and give it in 11.

MR. McDANIEL: What's 4?

THE COURT: 4 is the instructions with regard to general guilt, circumstantial evidence.

MR. McDANIEL: Well, I think that has to be given. If you're going to make a choice, I would ask that that be given and the other one be deleted because it's more important.

THE COURT: See, this is specific. The other is general.

MR. McDANIEL: But the other is on interpreting circumstantial evidence, don't you see? That is a really considerably different point, you see.

THE COURT: All right. I guess in the—as a super abundance of caution, I better give them both.

MR. IMHOFF: Well, they're sort of repetitive, aren't

THE COURT: Yes.

MR. McDANIEL: But they're on different points.

MR. IMHOFF: I don't think it's necessary to give both.

THE COURT: Well, the other is a general instruction as to circumstantial evidence, and that is specifically as to a question with regard to circumstantial evidence as it bears on the issue of intent.

Well, 4 is mandatory so I have to give it. Okay. I'll give it.

MR. McDANIEL: Let's go on to this knowledge of obscenity thing and get that clarified once and for all. That was in his instruction.

THE COURT: Let's go on—what did I do here? That concludes our mandatory and our generals. All right.

MR. McDANIEL: Okay.

Then, we'll go on to prosecution instructions.

THE COURT: All right.

Now, we go to plaintiff's proposed instruction No. 1:

"You may have, during the course of this trial, heard arguments or testimony, or read statements which were contained in exhibits which were admitted into evidence, which purported to declare what the law is or should be with respect to the legal definition of obscenity, or which purported to have some bearing upon this question of law. You may also, prior to this trial, have read articles or heard statements or arguments in regard to what the law of obscenity is or should be.

"I instruct you that the law in regard to any question involved in this case is only that which I give you in these instructions, and you are to disregard completely and totally ignore any statement, argument or

contention concerning matters of law which you may have heard, seen or read or otherwise become aware of from any source other than these instructions."

MR. McDANIEL: Your Honor, I offer to modify this instruction by eliminating the first two complete sentences so that it would start off with, "I instruct you that the law"—because that paragraph or that sentence, rather, properly tells the jury that they're to disregard other viewpoints of law than what they get out of the instructions, and that would eliminate the ambiguity of the first part of this instruction. It covers the important point that way and leaves out the questionable material. That way, it would read, "I instruct you that the law in regard to any question involved in this case is only that which I give you in these instructions, and you are to disregard completely and totally ignore any statement, argument or contention concerning matters of law which you may have heard, seen or read or otherwise become aware of from any source other than these instructions."

THE COURT: That would certainly cover the whole gamut, wouldn't it? Okay. I'm going to delete the portion before "I instruct you that the law," et cetera.

MR. IMHOFF: The part before that, the whole thing?

THE COURT: Yes. I think that also covers your point here and No. 6, so I'm going to reject yours.

MR. McDANIEL: Well, actually, that's different than what the law is. I think that one has to be given, your Honor. The point of that instruction is that they're to put out of their minds any subjective feelings that they may have about the material which could be kind of involved in their deliberations. It's a little bit different than erroneous knowledge of law or knowledge of erroneous law.

MR. IMHOFF: I think it's made clear in the instructions that they're to follow the law as the Court gives it, and that's all they're supposed to determine. And I don't like these negative instructions to a jury; you're not to do this and not to do that.

THE COURT: All right. I'm rejecting your No. 6, and I'm modifying plaintiff's 1.

MR. IMHOFF: You cut out the whole first part except down to where "I instruct you"—

Is that correct?

THE COURT: Right.

Okay. Now, we have plaintiff's proposed instruction No 2 which appears to be the definition as contained in 311.2—

MR. McDANIEL: Yes. I didn't object to that one.

THE COURT: All right. That will be given.

Plaintiff's 3, definition of "knowingly."

MR. McDANIEL: Now, this instruction would have to be modified to fit what the law is. The first thing I'd suggest is this: "You're instructed that Section 311(e) defines 'knowingly' as follows: 'Knowingly' means having knowledge of obscenity of the matter."

That's what the law was in '69. And then subsequent, going on from that, I have some objection to the language of definition here which I think I can clarify. I think that, to meet the Supreme Court requirements, this definition material would be proper if you added, at the first point where it says that it be established that defendant knew the character—if you added if it be established that defendant knew the contents and the character of the material here in question.

And then down further, the next sentence down, you get a repetition of the same thing which is defendant had knowledge of the character. If you add knowledge

of the contents and character of the materials, then I think that the instruction would lie.

Do you understand what I'm doing? Merely adding "contents" where the "character" is because the Supreme Court's cases have—although it's in opposition to the actual view I have that that doesn't establish knowledge of obscenity. I think that the instruction could come in if it had "contents" added wherever "character" is read. Even though I would object to that for the record, I would point out to your Honor it is the type of instruction that has been considered all right by the Supreme Court.

MR. IMHOFF: Have you decided yet, your Honor, which you're going to apply, as far as "knowingly" is concerned? Are you going to apply the definition of the statute in '69?

THE COURT: Well, we have to because we're proceeding under the statute.

MR. McDANIEL: I would think the best way to do it, actually, would not be to explain it, just: "You're instructed that 311(c) defines 'knowingly' as follows: 'Knowingly' means having knowledge of obscenity of the matter," period.

MR. IMHOFF: I won't—if you're going to apply that, I would object to that because the courts have not interpreted, under the old statute, that he had to know that the character was actually obscene. They have held that that's an impossible standard. And I can—if we're going to apply that statute, I think we should apply the one now because I think we have to apply the law as it's been interpreted by the courts now as to what, you know, knowledge means. And knowledge merely means being aware of the character of the material.

MR. McDANIEL: Well, let me respond to that briefly, though, because the point I'm making, as I said before, is in their definition language—if you intend to use it, you get past a real valid constitutional objection if you add "contents" wherever "character" is, because that's what the Supreme Court has held. I think that that is—that explanatory material is not good and that it confuses rather than aids the jury.

THE COURT: Instead of "character," "contents"?

MR. McDANIEL: "Contents and character."

MR. IMHOFF: Let me hand the Court another instruction in regard to this which would be applicable under the old law, I believe. We may put something together here if you—

MR. McDANIEL: I won't object to this.

THE COURT: All right. We'll put in the proposed number 3 in place and stead of the old one. I'll give that. I'll return this one to you.

Or do you wish me to include this as one of the rejected—

MR. IMHOFF: I was just thinking, if we could modify my new one in some way to get some of the language in—

THE COURT: Of what? The one you've submitted is your—"You are instructed that 'knowingly' means having knowledge that the matter is obscene. By 'knowingly,' is meant that the defendant must have known the contents of the material, and must have been in some manner aware of its obscene character. This requirement does not mean that the defendant must know that the matter would be held obscene by a court of law."

MR. IMHOFF: Yes, But now, as far as knowing the contents of the matter, that doesn't mean that he

had to know everything that was in the material. In other words, he didn't have to read the book or see the whole film or anything else. I mean, the courts have interpreted it to mean that he—you know, by other evidence, it can be inferred that he had knowledge of the contents of the material.

THE COURT: Well, that would be argument. You can argue that under this instruction because it says "must have known the contents of the material" and "must have been in some manner aware of its obscene character."

MR. McDANIEL: You can argue from that.

THE COURT: From his statements, you have—from the statements that Shaidell has indicated he made, you see—

MR. IMHOFF: What I'm trying to point out is under the old law the courts did not—as defense tries to put in his instruction here that he had to know beyond a reasonable doubt that it was—you know, went substantially beyond customary limits of candor or—one of the instructions that defense counsel submitted, he states that the defendant must know beyond a reasonable doubt that the material appealed to a prurient interest, et cetera, the other two elements of obscenity. And that was not the law under California law.

THE COURT: Well, we'll get to that when we get to his instructions.

All right. Do you want to return your previous proposed 3 and substitute—

MR. IMHOFF: All right.

THE COURT: All right. Plaintiff's proposed instruction 4.

Now, here's where there are a couple of appendages by the defense.

"You are instructed that 'obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, that is, a shameful or morbid interest in nudity, or sex, or excretion which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance."

MR. McDANIEL: Now, you see, your Honor, I don't have any objection to that. But I think, to clarify it, my instruction has to be given also, because it isn't clear from that instruction that they're separate and independent tests.

MR. IMHOFF: I think there's language in the case—I don't recall the case offhand where it states that these elements—you can't balance one element against the other. They must coalesce. I think if we get that instruction in here it would be much more brief and explanatory than going into a big long instruction that—what case is that?

MR. McDANIEL: Well, Jacobellis is the main one.

MR. IMHOFF: Yes, where—

MR. McDANIEL: The simple point is that the language—

I'm sorry, if you're going ahead, Counsel.

MR. IMHOFF: I was just going to say that I think the law is that you can't balance redeeming social importance against the other elements.

That's the point you're trying to make, right?

MR. McDANIEL: No, that's not the point I'm trying to make. The point I'm trying to make is simply that the Supreme Court has held consistently that each one of these three tests, customary limits, prurient

interest, social importance—these are separate and independent tests before material can be found obscene. All three of those elements must be found to be present beyond a reasonable doubt, not just two of them. Any given two of them would not be sufficient. That basically was the reason that the Supreme Court reversed in *Memoirs against Massachusetts*, because there they tried to balance the social importance against the prurience.

MR. IMHOFF: I agree that you have to prove these three elements of obscenity in order to prove that it's obscene. In other words, if it has any redeeming social importance, even though it may appeal to a prurient interest or go beyond contemporary community standards, it cannot be held to be obscene, or if it doesn't go to prurient interest. I would agree that's true. But I would object to this long dissertation here.

MR. McDANIEL: It's not really that long. I mean it reads pretty—read it aloud and you'll see that it really does cover—I mean it carries the ball properly, in my judgment.

THE COURT: Well, I will give plaintiff's 4 and—with the material that follows. I think we're going to cover the subject matter contained in 3 and 4. Therefore, I'm going to reject defendant's 3 and 4 as repetitious.

MR. McDANIEL: As long as that's—covers that these are independent tests, I don't care how it's stated, as long as the point is gotten out to the jury in the instructions that all three of these are separate and each has to be proved, and the material can't be obscene unless all three are proved. That's the only point I'm trying to make with those things. And if it's made

somewhere, I don't care how it's made. But I have to argue from that basis.

THE COURT: All right.

Now we're on plaintiff's 5 and 16.

MR. McDANIEL: Now, I have a specific objection to No. 5, and that is simply this, your Honor—

THE COURT: All right.

MR. McDANIEL: —that the Penal Code itself defines prurient interest in a very limiting fashion, that is, a shameful or morbid interest in nudity, sex or excretion. The legislative intent is clear by their not adding other descriptive words. They have limited the definition of prurience to a shameful or morbid interest. I think it's improper to go on and add a bunch of other adjectives to allege that they're synonymous to shameful and morbid, when, in fact, the Penal Code itself has specifically excluded—they could easily, if they wanted to say it, have added: i.e., unwholesome, shameful or morbid interest. And they left that word out, disgraceful, unwholesome, indecent—we have a very limiting statute here. The theory of that is to keep the door against First Amendment violations as closed as possible. And there's all sorts of language in Supreme Court cases to that point.

But here what happens by an instruction like plaintiff's 5 is simply that then the work of the legislature in narrowly defining this, which was the reason their statute was upheld, some of these Supreme Court cases, because they didn't have this extra verbiage—for instance, by way of analogy, in the Federal Code Title 19, I believe, Section 1461, which is the basic obscenity section as applies to Federal mail order prosecutions, it includes obscene and then a whole series of other words, lewd, and so forth. And that is always

given with an instruction in a Federal case, that all those words are merely verbiage; that they don't mean anything other than obscene itself.

And so what this does is it improperly expands the scope of what material could be classified to be prurient in a way that the legislature and the constitutional interpretation thereof of the section enacted by the legislature is opened up to a wide ambit than what it actually is legally opened up to.

THE COURT: All right. Here's what I'm going to do.

I'm going to give this as stated:

"You are instructed that in the definition which I just read to you the following phrase is used: 'the predominant appeal of the matter taken on a whole is to prurient interest, that is, a shameful or morbid interest in nudity, or sex, or excretion.'"

I'm going to add the following language from your 16:

"Under the law herein, a prurient interest is only a shameful or morbid interest in sex, nudity or excretion, as distinguished from a candid and normal interest in sex, nudity or excretion."

And then I'll go on and give the balance of these.

MR. McDANIEL: Okay. Fine.

MR. IMHOFF: I think, if I'm not mistaken, in line 3 of my 5 that should be "taken as a whole" instead of "on a whole."

MR. McDANIEL: Yes, he's correct. I would stipulate that it should be "as a whole," "the predominant appeal of the matter taken as a whole."

THE COURT: All right.

MR. McDANIEL: And also the "or" between "nudity" and "excretion" should be eliminated. It's just nudity, sex or excretion.

THE COURT: Strike the "or." All right.

Now, I'm going to give your modified defendant's 7 for "substantially," which reads:

"The word 'substantially' has been defined as greatly or considerably or largely."

MR. McDANIEL: Okay.

THE COURT: Okay.

Now, plaintiff's proposed 6.

MR. McDANIEL: I believe that I didn't have an objection to 6. Yes. I don't object to that.

Did I have one of my own on that?

MR. IMHOFF: I don't think you did.

THE COURT: All right. I'll read the whole thing, plaintiff's proposed 6:

"The average person is, of course, a hypothetical person. The phrase means a person with an average interest and attitude toward sex; not a libertine and not a prude, not a person who is preoccupied with sex and not a person who rarely, if ever, thinks about sex; not a person who thinks sex is the most important thing to be discussed and not a person who thinks sex should never be discussed. The phrase means a normal individual of average sex instincts; not one who is undersexed, not one who thinks sex is the most important factor in life, and not one who is afraid of sex or ignorant of sex or bored by sex. In short, the phrase 'average person' means a normal, healthy, average adult man or woman with normal, healthy, average attitudes, instincts and interests concerning sex."

And the defendant's proposed 22 says:

"The appeal of the material involved herein must be measured only by its appeal to the average adult person."

I think that's covered so I'm going to give plaintiff's

6. I'm going to reject defendant's No. 22 as being repetitious.

MR. McDANIEL: Let me just note for the record, if I may, objection to that rejection and also note a continuing objection wherever the Court rejects a preferred defense instruction. I'd like the record to reflect that we object to that for the record.

THE COURT: The record will so show.

Okay. Now, we have plaintiff's proposed 7:

"You are instructed that the term 'utterly without redeeming social value' means that the material has no literary, scientific, or artistic value in its depiction of sex or nudity."

MR. McDANIEL: That I object to specifically, your Honor. That, again, is a formula, a negative-type obstruction, because the advice of it is simply that it goes from a term to then talking about the material charged.

What I think would be proper would be merely a definition of the term "utterly." And that term has been defined as meaning absolutely or totally. I think the rest of this is wrong. So I think a definition of "utterly" is in order. But I think that this type is repetitious, formulistic, and prejudices.

MR. IMHOFF: I think it's a state of the law, your Honor.

THE COURT: Well, what I'm going to do is I'm going to give both plaintiff's 7 and defendant's modified 23, which says:

"Material has social importance if it has the capacity to broaden man's range of sympathies or consciousness, or to enable him to see, hear or appreciate what he might otherwise have missed, or deepens his emotions, or makes life seem richer, more interesting or more com-

prehensible, or offers entertainment, or provides insights into man's relationship to the society in which he lives."

MR. IMHOFF: I think that's merely dictum, isn't it, from a case? I mean, it's not—it's an argument from a case, you know, reasoning. I don't think—the law, especially the part about entertainment—I don't think that's the law.

MR. McDANIEL: Yes, it is. It's been held by the Supreme Court in many cases; entertainment is sufficient.

MR. IMHOFF: That means different things to different people. I mean, when you talk about entertainment—I would object to that instruction being given as not a correct statement of the law.

THE COURT: All right. Your objection is noted. The Court will give both together on the question of utterly without redeeming social—

MR. McDANIEL: Your Honor, let me interject, if I may. I've written out one more, which is defendant's 63, which I'd offer in to consider at the same time. Defendant's 63 reads:

"You are instructed that the term 'utterly' as used in these instructions has been defined as totally or absolutely," because there isn't any definition yet of the term "utterly" that's before us.

MR. IMHOFF: I believe the courts have said, though, that all material may have some social importance, you know, very slight. That doesn't mean it's redeeming social importance.

MR. McDANIEL: Well, that Counsel, is exactly the point that *Memoirs against Massachusetts* was reversed on, where they said—the Massachusetts Supreme Court held that there was some slight social im-

portance to the work in question, and therefore, in balancing that, that slight value went out the window, and they held that that's wrong; that the term "utterly" means what it says; and if there's any value at all, it can't be found obscene. And I think that "utterly" has to be defined. The dictionary definition is totally or absolutely.

MR. IMHOFF: What dictionary?

MR. McDANIEL: Well, I'll rely on whatever dictionary is in the judge's chambers here.

THE COURT: It does seem like that might be—the clerk has a dictionary.

MR. IMHOFF: I took mine out of the Third Webster's International—

THE COURT: Your term "utterly without redeeming social value"—

MR. IMHOFF: And that's what the law says, no literary—

THE COURT: —which means totally or absolutely.

MR. IMHOFF: As long as we're on social value, I told you I had one that was being typed up that I didn't have that I wanted to submit, and I'll do that as soon as we're through with this.

MR. McDANIEL: Here we have "utterly" defined as in an utter manner, entirely, completely, absolutely.

THE COURT: Okay. Well, I think that's reasonably set forth. All right. What is the other one you have?

MR. McDANIEL: I would object strenuously to this. This is some kind of argument and legal jargon which—

THE COURT: Expert evidence is required by the prosecution—I think it's a misstatement of the law.

MR. IMHOFF: Not on redeeming social importance.

THE COURT: Well, when you're talking about obscenity, you are of necessity including, as a subelement, the possibility or lack thereof of social importance, so—

MR. IMHOFF: Well, if you'll read *People versus Newton*, it states that when the People have put on expert testimony, as to the first two elements of the offense, then it's the burden of the defense to go forward with evidence on redeeming social importance.

MR. McDANIEL: Well, your Honor, that was a procedural decision, and it's not—it contradicts *Gianini*, to begin with. It also contradicts what the Supreme Court has held which is that all these elements have to be proved. You don't get by without proving it. And the legal presumption, again, is that the stuff's not obscene. So I don't know where they get off by saying that they don't need to prove it, you know. They got to prove the elements of their crime.

MR. IMHOFF: I would ask the Court to read those cases before making a decision.

MR. McDANIEL: I'll submit that if that instruction were given it would be reversible error.

THE COURT: Well, 9 Cal. App. 3d, Supplement 24—well, this is the language of the decision on the point: "While the burden of persuasion as to lack of redeeming social value is on the prosecution, where the other elements of obscenity exist, the burden of going forward should be, and we feel is, on the defendant."

It is interesting to note that there was no evidence of lack of redeeming social value. While this fact was commented upon by the court in footnote 5, it

was not one of the elements, proof of which the court found required expert testimony.

"We feel that the police reports themselves contain sufficient material to compel the defense to go forward with a showing of the possible existence of some factor of social value."

MR. McDANIEL: The problem is that this instruction goes against what the actual requirement is, that they have to prove all of their case. And, in the first place, that's on some kind of a motion. It's on a submission on police reports, and so forth. We've got a full-blown jury trial here with live testimony, and so forth. It's just a completely different situation.

THE COURT: The evidentiary burden would be the same, whether it would be a court or jury trial.

MR. McDANIEL: Of course, the point is that, first of all, they don't specifically hold that. They rely on Giannini. And Giannini doesn't decide whether expert testimony is required on social importance or not. They just don't decide that point. They decide on the other two points and leave that one undecided.

MR. IMHOFF: Nobody is an expert on redeeming social importance.

MR. McDANIEL: That may or may not be the case. I think there are experts. I used one as an expert on the—

MR. IMHOFF: You can bring somebody in, maybe, who's an expert on literature, if you're doing a book; and he could testify. But he doesn't have to be an expert, I don't think, on that issue. And so—the instruction can be reworded if it's not consistent with the language of the case.

THE COURT: Well, I'm going to give plaintiff's 7 in conjunction with defendant's modified 23.

MR. McDANIEL: And a definition—

THE COURT: Plaintiff's 7A. And defendant's 63—

MR. McDANIEL: Your Honor, with regard to that that you're calling 7A, then there's going to have to be added something else because there's something that's clearly left out. It says that you're instructed that the burden of persuasion, et cetera, is on the prosecution. However, the burden of going forward is on the defense. That's not correct. What the case says, that if those other elements are established—and you'd have to add, beyond a reasonable doubt—then the burden of going forward is on the defense. That's not in the language of this instruction. And so what this does is it presumes that they've proved that when that's not the case at all.

It's up to the jury to decide whether they've proved that or not.

Do you understand the point I'm making?

MR. IMHOFF: It says, where the other elements of obscenity exist. It doesn't say they have to be proved beyond a reasonable doubt, but if they exist, the burden of going—the burden of going forward should be on the defendant.

Now, we have certainly introduced evidence upon these two points, expert testimony on those first two elements of the obscenity statute of prurient appeal and community standards, and—

THE COURT: We've given the elements in other instructions. We're just merely talking about this one factor.

All right. I'm going to give plaintiff's 7, defendant's 23 modified, plaintiff's 7A and defendant's 63 on this question of utterly without—

MR. IMHOFF: Which is 63?

THE COURT: That's the defendant's definition: "You are instructed that the term 'utterly' as used in these instructions has been defined as totally or absolutely."

All right. Now, let's go on to 8.

"All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinions—have the full protection of the guarantees of freedom of speech and press unless excludable because they encroach upon the limited area of more important interests. Implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. Obscenity is not within the area of constitutionally protected speech or press.

"There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never thought to raise any constitutional problem. These include the lewd and obscene. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them are clearly outweighed by the social interests in order and morality.

"Sex and obscenity are not synonymous. The portrayal of sex, that is, in arts, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern. On the other hand, obscene material is material which deals with sex in a manner appealing to a prurient interest."

MR. McDANIEL: Now, to object to this, it's basically just a bunch of argument. It misconstrues all the tests, says, "slight social value." That's obviously—

THE COURT: I'll refuse that.

MR. IMHOFF: Well, this was right out of Roth, your Honor, the leading case on the area of obscenity.

THE COURT: It is argumentative.

We've included all the instructions with regard to redeeming social importance, anyway. It would be repetitive and argumentative.

MR. IMHOFF: I believe this case indicates, your Honor, that some things may have a slight social importance but they're not protected.

MR. McDANIEL: That's not what the law is. Again, read *Memoirs against Massachusetts*, and it clarifies it. 383 U.S.

THE COURT: All right.

No. 9:

"You are instructed that for the purpose of determining the obscenity of the material here in question, the relevant community is the entire State of California. The People must prove, by expert testimony, that the predominant appeal of the material in question, to the average person applying contemporary standards, is to prurient interest, and substantially exceeds customary limits of candor in description or representation of nudity, or sex, or excretion."

MR. McDANIEL: Objection to this one. That's repetitious. You've already indicated that the relevant community is the State of California. We already know that this other part of it is completely out of place here. It's not a meaningful instruction.

MR. IMHOFF: I don't think we have any previous instruction on the relevant community, do we?

MR. McDANIEL: I would be willing to have this given by just going through as follows:

"You're instructed"—stopping at "California," eliminating the rest of it.

MR. IMHOFF: Well, this is a statement of the law taken from *In re Giannini*, your Honor.

MR. McDANIEL: No, it's not. I don't have any quarrel with it up to the end of the sentence, "the entire State of California." The rest of it is just—

THE COURT: We have given the expert-testimony instruction.

MR. IMHOFF: I don't recall.

THE COURT: Yes. We have one saying expert testimony has been presented to help you with—

MR. IMHOFF: Well, that—I think that instruction defines an expert and how you weigh his testimony.

THE COURT: Right.

It does appear to be repetitious.

MR. IMHOFF: Well, we don't have an instruction on the relevant community which is the State of California.

MR. McDANIEL: Maybe you ought to just give it down to the end of the sentence "State of California" and stop there, eliminating the rest of it. That much is proper. I believe he may be correct that there wasn't that part given previously.

THE COURT: All right.

MR. IMHOFF: I would object to the deletion of the remainder of the instruction. I think it's the proper instruction under the law—in the case of *In re Giannini*, I—

THE COURT: Well, haven't we already said that—I can't recall. Haven't we already said something about the expert testimony?

MR. McDANIEL: Yes, you have. The point that I was saying is to make—

MR. IMHOFF: That was in regard to redeeming social importance, I believe.

MR. McDANIEL: No. It was also on expert testimony. That has been given, the whole business on that.

The point is that the relevant community is the entire State of California. There's no quarrel about that part of it. The rest of it is superfluous, repetitious and not proper.

THE COURT: All right. I'm going to strike "the People must prove, by expert testimony," et cetera.

MR. IMHOFF: And my objection will be noted in the record?

THE COURT: So noted.

All right. Then you have submitted—that would be repetitious. I'm going to reject defendant's proposed instruction No. 8.

MR. McDANIEL: I object to that rejection.

THE COURT: Now, you've submitted a better instruction of "utterly" than you did before. Here you say, "Under the law, the word 'utterly' has been defined as follows: To an absolute or extreme degree; to the full extent; absolutely; altogether; entirely; fully; thoroughly; totally," which, I think, is better.

MR. McDANIEL: I'll—

You think this one's better here?

THE COURT: Yes.

MR. McDANIEL: Okay.

THE COURT: "The word 'redeeming' in the context herein—

MR. IMHOFF: I think that part is totally confusing.

THE COURT: Well, we already have "redeem-

ing," so I will strike that portion. I much prefer this definition—I'm going to give that as modified.

And I will return to you this 63.

MR. IMHOFF: What number is that one?

MR. McDANIEL: 24.

THE COURT: That's defendant's 24.

MR. McDANIEL: I'll withdraw 63.

THE COURT: Okay.

Now, we're going to rewrite this?

MR. McDANIEL: Defendant's 12.

MR. IMHOFF: Which one is that?

THE COURT: The comparison with other contemporary matter. All right. So we'll hold that in abeyance.

Incidentally, I want to insert 2.60 and 2.61 in its appropriate position.

All right. Considering defendant's proposed 25 and 26, both will be rejected as formula and argumentative.

MR. McDANIEL: Well, I want to argue, for preservation of the principle involved, that the Supreme Court of this State has determined that the scope of 311.2 of the Penal Code is limited to materials that are hard-core pornography and nothing more. That's a specific holding by the Supreme Court. It adds considerably to the definition of what this statute is intended to apply to, and it's, I think, incumbent upon your Honor to give what the definition of what that statute reaches to the jury. I don't care if this language needs to be revised in some fashion. But it is true that hard-core pornography has been held as the only material that can be found obscene under this section. And I am entitled to that authoritative interpretation by the State Supreme Court.

MR. IMHOFF: I would disagree that that's the

present state of the law, your Honor. I think that—I believe the second part of the instruction is just a definition of hard-core pornography given by—

MR. McDANIEL: Justice Stewart.

MR. IMHOFF: I would disagree that that's the present state of the law, your Honor. That certainly has been eroded, if it ever was the law. And the test of obscenity is what the Supreme Court has said it is. And it's the Roth test, and you have to apply that particular test to every particular work, and—

THE COURT: We've given them a definition of what is pornography, et cetera, et cetera, et cetera. And I think this is just repetitive and argumentative.

MR. McDANIEL: Well, could I phrase that in such a way that it would get past the argumentative? Just "You're instructed that this law prescribes only hard-core pornography," period, because that is the law. It's never been overruled. That's Zeitlin versus Arnebergh, specific holding by the California Supreme Court. That is the legal test in this State, and it has not been overruled by the California Supreme Court or any other court.

MR. IMHOFF: The legal test, I believe, is the statute itself, your Honor, and—

THE COURT: Well, you may submit an instruction tomorrow morning. But if you don't do it by tomorrow morning—tomorrow morning these instructions will be finalized.

MR. McDANIEL: I will rewrite an instruction on that tonight, your Honor.

THE COURT: I'll consider it, but I'm not making any advance statements as to what I will do.

All right. Now, we have defendant's proposed 29.

"The statute under which this prosecution is con-

cerned requires knowledge by the defendant that the material named in the complaint was obscene at the time it was sold."

I think we've already said that.

MR. IMHOFF: We've got past that.

THE COURT: So this will be rejected as repetitive.

Now, we have 41:

"Freedom of speech and of the press guaranteed by the Constitution embraces all information and education with respect to the significant issues of the times, embraces all issues about which information is needed or appropriate to enable the members of society to cope with the problems of their period."

MR. IMHOFF: I think that's irrelevant. I think that we should reject it on the same reasoning that you rejected my instruction on constitutional standards, and so forth. It's argumentative.

MR. McDANIEL: It's not argumentative at all.

THE COURT: I'll give that one.

MR. McDANIEL: Thank you.

THE COURT: It's just a definition of what's covered by freedom of speech as it applies to these matters. It's all encompassing. I really don't see where it helps either side.

MR. McDANIEL: Well, I think it will certainly clarify some points I'll raise in argument, you see.

MR. IMHOFF: I can't see where that's relevant, your Honor, to our issue here of obscenity. You rejected my big long instruction on things that were protected by the First Amendment and the reasons they were protected and—

MR. McDANIEL: That's because you had all kinds of negative argument. This points out what is

protected. It's subject to the same objections as that other one. I think it needs to be given; it should be given.

MR. IMHOFF: Can we reserve that one until tomorrow?

THE COURT: All right. I'll reserve that one until tomorrow.

MR. IMHOFF: I'd like a copy of it.

THE COURT: Okay. I'll put a question mark here, and we'll go over that one tomorrow.

MR. IMHOFF: I'd like to copy it down before I leave.

THE COURT: Certainly. It's defendant's 41.

MR. McDANIEL: The rest of these are the ones on stuff that you're going to make your own—

MR. IMHOFF: I haven't seen one—
Is that in regard to the exhibits that you introduced, what they mean?

MR. McDANIEL: Yes.

MR. IMHOFF: I'll wait until tomorrow morning and see what the judge writes up.

MR. McDANIEL: Okay.

To finish this up, I just have one more batch that is real brief.

THE COURT: Okay. The rejected instructions are all set forth here. Give them a look. I think I have indicated on the bottom of each why they're rejected.

MR. McDANIEL: Well, your Honor, there's one stack, defendant's 56, 57, 58, 59, 60, which I'll offer. These are instructions on decisions by the Supreme Court and the California Supreme Court on other materials, and I think they should be given. I am asking your Honor to take judicial notice of the determinations in the cases that are specified, and I would like

to consider them all as a group. The same principle applies to all of them.

THE COURT: Are they subject matter that was presented to this Court?

MR. McDANIEL: No, it was not presented.

THE COURT: Then I will reject them. The jury has not seen the alleged contemporary matters, and there has been no submission to this Court of the particular material.

MR. McDANIEL: Okay. I'd like to have them in the record as rejected, though, because I do object to that. As I say, I have asked your Honor to take judicial notice of those decisions.

MR. IMHOFF: I would object to that.

THE COURT: All right. We'll make those entries. These are the ones that are rejected, and I want you to look them over quickly so you can present whatever arguments you wish at this time. And give them to counsel.

MR. McDANIEL: Your Honor, at this time I have objected on the record to all these rejections. I will not make any further argument, so that—I'll just submit it. I don't want to go over it.

THE COURT: Okay.

What about you? The same?

MR. IMHOFF: Yes. I—

THE COURT: I think we discussed every one of these.

MR. IMHOFF: Yes, we did. And you've rejected them. Is that—

THE COURT: I have rejected them.

Now, with regard to 56—insofar as defendant's 56, 57, 58, 59 and 60, none of the items involved herein have been presented to this jury for comparison and

have not been submitted to this Court for determination of comparability, are outside the scope of the evidence herein. They are written in formula form and are argumentative. And as a consequence, the Court will reject their submission.

MR. IMHOFF: I'd like to call the Court's attention to People's 2 for a minute, the statute itself. I believe this is the 1970 amended statute. There were some changes in the statute, a rewording of it and a rearranging. I believe this is the latest statement of the law. I don't think it's the wording of the statute at the time defendant was—exactly the same wording of the statute at the time the defendant was charged.

MR. McDANIEL: Counsel may be correct in that point. I would stipulate that your Honor could—

THE COURT: All right. Do you want to amend that, then, to have it read as it was? What can we do—

MR. IMHOFF: I think the Complaint itself would be the wording of the statute as it was in '69, because we usually just copy the language of the Complaint.

THE COURT: All right.

Will you do this? Will you write up an instruction to supplant 2 tonight and submit it tomorrow morning?

MR. IMHOFF: Yes. I'll check it over and—

THE COURT: All right.

And would you make a note that we're to discuss 2 and 41?

MR. McDANIEL: Okay.

MR. IMHOFF: I don't know whether it would be appropriate to give this one or the—

MR. McDANIEL: Well, if he makes up one that makes that language the '69 language, I would have no objection to that. The difference is only in a semicolon, I believe, so—

MR. IMHOFF: They've rearranged the language a little bit. Basically, it's the same thing, you know. It's the same offense.

(Recess.)

LOS ANGELES, CALIFORNIA,
TUESDAY, FEBRUARY 2, 1971 9:40 A.M.

(The following proceedings were held in chambers:)

THE COURT: In the case of People versus Murray Kaplan, the record will show defendant is represented by counsel, the People are present and represented; and the following proceedings are in chambers outside the purview of the jury.

Very well, Mr. McDaniel.

MR. McDANIEL: Yes, your Honor.

I previously indicated that I offer the motion picture film Mona as a comparable exhibit to the material charged in this case. The film Mona was found not obscene in a decision which I've previously—

THE COURT: That was a San Francisco Municipal Court decision?

MR. McDANIEL: Yes, by Judge Harry Lowe. That was January 11th. And I believe the record already has the—but I'll repeat that for the record at this time.

The motion picture film Mona was found not obscene in a hearing in the San Francisco Municipal Court in the case of People versus Natali and Sullivan, San Francisco Municipal Court Nos. R22045 and R22047, on January '11, 1971, Judge Harry Lowe, judge presiding.

And that decision was made in a procedural format similar to the procedural format employed in the

trial court-level actions in the Bonanza case previously alluded to wherein a motion to suppress seized evidence was joined with a motion on constitutional determination. And the 1538.5 motion was granted on the basis that the judge found the film to be nonobscene. That film has also enjoyed an over three-month extended run in Los Angeles County at two different theatres without any incidents of arrest or questions raised as to any possible action against it, so that I think it comes in properly as a litigated example of material that's been found not obscene as well as an example of material that is available, tolerated and accepted by the community, as evidenced by its lengthy play here.

Frankly, the film is very comparable. It's a stronger motion picture film, in terms of sexual activity, than any of the exhibits involved in this case, and yet was still found not obscene, as I previously indicated. It's in full color, depicts various sexual and nudity episodes in the life of this girl Mona, essentially. It's now playing at the Eros Theatre. It played at the Cinema Theatre for some two and a half months, then shifted to the Eros Theatre.

And so I offer that in as a comparable on that basis at this time.

THE COURT: Mr. Imhoff?

MR. IMHOFF: Well, one thing I would object to the film, in the sense that—number one, we do not have any record before the Court to indicate what the findings of the court were, whether they made a specific finding of obscenity or whether it was just a—I believe counsel indicated the other day the record just indicated a denial of a motion.

So if that were true, there would be no way to de-

termine what the basis of it was. And we can't go beyond the docket sheets and the minute orders of the court to determine that.

Counsel does not have, apparently, a copy of the film, so there would be no way to offer it into evidence. And I don't think that there's been any showing that the material is comparable. In other words, we'd have to look at it, for one thing, to determine if it was comparable or not.

And it may have had redeeming social importance of some kind or some other reason why it would be—the motion would be denied.

So I would object to it on those grounds.

THE COURT: As I understand it, Mr. McDaniel, the minute order and the docket sheet indicate that there was a 1538.5 motion made, the 1538.5 motion was granted, and there were no findings delineated in either document.

Is that correct?

MR. McDANIEL: No.

The way that I determined what the actual finding was was by two procedures:

First of all, I contacted the attorney who had been involved in the case and found out from him that the film had been found not obscene by Judge Lowe and that the 1538.5 hearing had been expanded, in the sense I have indicated, as similar to the trial court in Bonanza; that is to say, they went beyond merely probable cause questions of seizure and determined the issue of obscenity in the same fashion that Judge Ackerman did in the Bonanza case below.

I further checked that out by contacting the court in San Francisco and determined that that was the case. It's correct that the docket entries don't spell out

—and there is not a memorandum opinion. But that was the basis of the opinion, as indicated both by the court and by the attorney.

The attorney who was involved in that case is Mr. Michael Kennedy of San Francisco who—

THE COURT: I believe you've also indicated that the film involved is a color motion picture with a story line, sound and music.

MR. McDANIEL: Yes. The story line is perhaps—it's hard to say, you know, how you'd describe the story line. What it really is is a very loosely connected series of sexual and nudity episodes, and in that sense it's really very similar to the film charged here, and indeed it's very similar to the other materials charged here, too. And I think it's comparable on a constitutional or First Amendment basis, quite clearly.

It was prosecuted for obscenity. It was found not obscene. It contains a great deal of graphically displayed sexual activity and nudity, a lot of close-ups, full color and so forth.

So that, in my judgment, it's as comparable a motion picture film as one could come up with.

THE COURT: Very well.

MR. McDANIEL: And it is available for, you know, viewing. I'm prepared to defray the expenses of everybody going to see the film.

THE COURT: You're suggesting that the Court take the jury to the Eros Theatre and permit them to see the film?

MR. McDANIEL: That is correct, your Honor.

THE COURT: Well, there has been no documentary evidence presented, by way of a copy of the docket sheet or minute order. There is no documentary evidence with regard to the fact that the determination of the court was based on a finding of nonobscenity.

The Court has not seen the film to determine whether or not it is sufficiently comparable so that it can be submitted to the jury. The Court is not disposed to take the jury to the theatre for purposes of seeing the film, firstly because the Court has not seen the film, and, more importantly, because of the lack of foundation on the question of the determination of the Court.

The offer is rejected.

Now, with regard to the balance of this presentation, do you have any further evidence, Mr. McDaniel?

MR. McDANIEL: Yes.

I have two more items that have been marked which I want to introduce. And I'd like to do that in front of the jury.

THE COURT: What are they?

MR. McDANIEL: One is the entertainment pages of the Los Angeles Times, and the other is the entertainment pages from the Los Angeles Free Press, the current issue of each paper.

THE COURT: What is your offer of proof?

MR. McDANIEL: The offer of proof there is, again, it's just some evidence—not the entire case but some evidence which the jury can properly consider of just what indeed is factually going on, what films are advertised as being playing around the area here. I don't rest the entire case on that, of course, but it is just one piece in the mosaic of evidence that I intend to present, and—

THE COURT: You mean, it will contain titles of pictures that are being shown around town?

MR. McDANIEL: Yes, and descriptions, too, which tend to illustrate quite clearly the point that I am interested in emphasizing here.

THE COURT: All right.

Do you have the exhibits? Let me see them.

MR. McDANIEL: The clerk has them. What I would be willing to do—when I've introduced entertainment pages previously, I would like the record to reflect that they've always been allowed to go in. What I've done is I've—for instance, with this one, and with that one, I take out the material that isn't relevant and just introduce the parts of the paper which are on the films. I'll show you where they are in each of the two here.

The motion picture ads start in the Free Press on page 66 and run through page 71. So that would be the portions that I would intend to introduce.

THE COURT: Well, I don't think it can be determined from the material contained herein whether or not these items would be comparable. The offer as to—

MR. McDANIEL: That's Exhibit U, the Free Press.

THE COURT: Exhibit U, the Free Press, is rejected and denied.

As to the—

MR. McDANIEL: Well, with the Times, I more strenuously urge—that's a—the major paper of the West Coast, really. It's classified as the authoritative newspaper of California. And I've always been able to introduce this material in cases of this nature. It's, I think, only fair to let the jury get some kind of view of what's going on, because that's clearly part, if not all, of what the test of the contemporary standard is.

And the fact that these films are advertised in the Times and are playing in commercial theatres is quite

probative, so I think that it's incumbent upon this Court to allow me to introduce this exhibit.

MR. IMHOFF: I would object, your Honor. I don't believe it's relevant to contemporary community standards. It's the same thing as trying to go out and buy a book and say, well, this is available in the community; I bought it down the street.

I think the Court has already ruled on matters such as that. Just because something is advertised in the newspaper and is showing does not mean it's legal. And defense counsel is trying to infer, by the fact that something is advertised in the newspaper, that therefore it's constitutionally protected.

We have cases filed against a lot of those theatres that advertise in the Times showing these films. And it's just a round-about way of trying to bring in material that's irrelevant to contemporary community standards.

Just because something is being done does not mean that it's accepted by the community, doesn't go beyond the standards.

MR. McDANIEL: Your Honor, let me respond to that argument.

First of all, it's completely off base because there's no claim that the materials being shown have some kind of decision of constitutional protection. What they do show is something about community standards which is helpful. That helps them in determining the issues in this case. They don't need to determine the issues in some other possible case. They're interested in determining only the issues in this case. And this is some evidence of community standards which is perfectly probative and proper to come in.

THE COURT: Well, the problem presented is that, by reading the paper and seeing the titles of motion pictures and maybe even seeing the copy purporting to depict what is shown in the film, without knowing actually what is depicted in the film or presentation or whatever it is that's being advertised, the jury has really no standard. They don't know what has been shown. They have no basis upon which to make a comparison. The fact that there is an advertisement doesn't prove or disprove any of the issues in this case.

As a consequence, the offer of proof is rejected, and the motion to have the item submitted is denied.

MR. McDANIEL: I want those left in the record.

THE COURT: Very well.

MR. McDANIEL: I'd object to the rejection of T and U.

THE COURT: T is the Times movie section, and U is the Free Press. Very well.

MR. McDANIEL: Now, that's the extent of the defense presentation. When the jury comes in, I will rest. I don't know if the prosecution intends to—

MR. IMHOFF: I have one item to offer in rebuttal.

MR. McDANIEL: What is it?

THE COURT: Yes. What is it?

MR. IMHOFF: Has defense rested?

THE COURT: Well, he indicated he would rest as soon as the Court resumed.

MR. IMHOFF: Okay. I'll get it. It's in my briefcase.

THE COURT: Before you present your item, by reason of the Court's instruction that was composed this morning, are you going to withdraw 12, 54, 55, 61?

MR. McDANIEL: Those are the ones that—in your instruction, you've covered specifically all those exhibits so that it won't be necessary to have these; is that correct?

THE COURT: Well, that was the Court's intent.

MR. McDANIEL: Yes. I don't have any objection to not using those and using your own.

THE COURT: All right. Then you're withdrawing 55, 54, 12, 62 and 61?

MR. McDANIEL: Rather than withdraw them, I would prefer it if the record reflected that you rejected those in favor of yours and I made an objection to that, if that's okay, just for the record.

THE COURT: Very well.

The Court will reject the previous-named proposed defendant's instructions on the basis of their repetitious character.

MR. McDANIEL: Then the record, I believe, already reflects a continuing defense objection to each and every defense instruction which was rejected or modified?

THE COURT: Very well. The record will so show.

All right. May I see your—

MR. IMHOFF: Yes. I would ask the Court to take judicial notice of the fact that the magazine entitled "My Name is Bonnie" has been held not to be obscene by the Ninth Circuit Court of Appeals and—

THE COURT: Not to be obscene?

MR. IMHOFF: Held to be obscene. I'm sorry. Held to be obscene. I have the magazine here which I would like to use in rebuttal to the magazines and other materials that defense counsel has offered.

I have a copy of the Ninth Circuit's decision for the Court to look at.

MR. McDANIEL: Well, your Honor, the problem with that is that that case is on appeal now, so it can't be used.

THE COURT: Is it on appeal?

MR. IMHOFF: I don't know. But, of course, even if it were on appeal, defense's exhibits, for example, in the Municipal courts are not final determinations either.

MR. McDANIEL: Yes, they are. They are not on appeal. Those are terminal decisions.

MR. IMHOFF: Any other court of equal jurisdiction could find those magazines to be obscene and

THE COURT: Well, if this decision or if this matter is being reviewed by a higher court, that vacates the decision below, does it not?

MR. McDANIEL: And it is—

THE COURT: Well, is it or isn't it? If it's a final determination—it would appear to be.

MR. IMHOFF: I don't have any knowledge of the fact it's on appeal. If defense counsel has any proof of that, I'd ask him to bring it forward.

THE COURT: This decision was made September 16, 1970.

MR. McDANIEL: Yes. It's on appeal to the United States Supreme Court at this time, your Honor.

THE COURT: Well, why don't you call the clerk of the Ninth Circuit and determine that? If it is not on appeal, I will consider its submission. If it is, then, of course, that would vacate this decision at this time. It would not be a terminal decision.

Do you want to call?

(There was held a recess.)

THE COURT: The record will show that both counsel have corroborated the fact that the material, subject matter of the decision by the Ninth Circuit Court, *Collectors Publications versus United States*, has been accepted by the United States Supreme Court. And as a consequence, the decision would be vacated and the Court would be required to reject the offer of proof.

Do you want to have that put in evidence or do you want to describe it for the record and we'll—you can have it indicated by—in case you want to have that portion—

MR. McDANIEL: You could offer it in as your Exhibit A and have the same stipulation that I had, that they can be removed.

THE COURT: If you're both going to rest, why don't you argue your motion right now?

MR. IMHOFF: Well, just let the record note that this has been rejected.

THE COURT: Well, do you want to describe the exhibit for the record?

MR. IMHOFF: Yes. The exhibit was a magazine entitled *My Name is Bonnie*, which is a—24 color pages and several black-and-white pages of a woman posed in the nude with the vagina exposed and emphasis on the vagina with no apparent sexual activity. And it has been rejected.

THE COURT: And it's the subject matter of what case?

MR. IMHOFF: *The People versus Murray Kaplan*.

THE COURT: No.

MR. IMHOFF: I'm sorry.

Marvin Miller, Covina Publishing, Incorporated, a

corporation doing business as Collectors Publications versus United States of America. The case number is 23,935. It was the subject of a decision by the Ninth Circuit Court of Appeals, Federal Ninth Circuit of Appeals.

MR. McDANIEL: And now has been taken up by the Supreme Court. Is that correct, Counsel?

MR. IMHOFF: And I've discovered that it has been appealed to the United States Supreme Court for decision.

MR. McDANIEL: Now, may I have a stipulation from counsel that when the jury comes back in the defendant will rest and then the People will rest?

Is that so stipulated, Counsel?

MR. IMHOFF: Yes, I intend to rest.

You have nothing further; is that correct?

MR. McDANIEL: Yes.

MR. IMHOFF: Then I intend to rest. And I would like to—you said something a moment ago, Counsel, about stipulating to having these withdrawn. I believe I stipulated that they could be withdrawn unless he was found guilty.

MR. McDANIEL: Well, then, of course, it's up to the defendant to make sure that the record is properly protected. I would put these materials back into the case for purposes of an appeal.

MR. IMHOFF: I couldn't stipulate that they could be withdrawn if the defendant were found guilty because they would be necessary for the appeal, and there would be nothing to require defense to bring them before the Court.

MR. McDANIEL: Well, that's not technically correct. As a matter of fact, from the counsel for the prosecution's point of view, it would be better if they

weren't in there. But I will make the representation that they will be made part of the record, if it has to go up on appeal, because I do need to use these exhibits in some other matters.

THE COURT: Well, you can always have them brought over and incorporated by reference, if nothing else.

MR. IMHOFF: I believe we had a discussion about that, and I made a point, if he were found not guilty or if they were hung, they could be withdrawn. I don't believe there was any actual stipulation that they could be withdrawn in the event there was a guilty verdict.

THE COURT: I can't recall.

(There was held a recess.)

THE COURT: All right.

Let me hear the 1118 motion.

MR. McDANIEL: Okay.

First of all, it is stipulated, is it not, Counsel, that the materials involved in this case do not constitute hard-pornography?

MR. IMHOFF: I will not stipulate to that because there's been no, you know, court definition of hard-core pornography. The Courts have never defined it, and therefore I can't stipulate to that.

MR. McDANIEL: Well, you would stipulate, with regard to Exhibits 1 and 2, that they do not contain a graphic depiction of sexual activity. Is that correct, Counsel?

MR. IMHOFF: No, I will not stipulate to that.

MR. McDANIEL: All right.

Your Honor, since there's been stipulation by counsel that both sides will rest as soon as the jury returns, I believe it's proper to argue a motion under 1118.1 at

this time, at the conclusion of all the evidence in the case. And I'd like to point out to your Honor that, in determining a 1118.1 motion, the test is whether a conviction would be sustained on appeal. That's written right into the Code language in 1118.1.

Now, the evidence presented in this case by the part of the prosecution shows a failure to prove its case on all the essential elements. For instance, there is no showing whatsoever by the prosecution that the materials don't have any redeeming social importance to any degree. There's no showing by the prosecution, based on any competent evidence, that any of the materials have a predominant theme which appeals to the prurient interest of the average viewer.

With regard to that, it must be pointed out that the witness who testified for the prosecution was unable to base his testimony on prurience on any type of activity which might be construed as a testing of state-wide standards, since he indicated quite candidly in his examination that he had not questioned or tried to determine prurience on a state-wide basis but based that on his experience as a police officer here in L.A. County and by talking to people here in L.A. County.

There also isn't any showing that the materials go substantially beyond customary limits of candor by the prosecution because their witness on that point again testified only that he asked if various activities which he described in his questions went beyond the standards of a given community.

There was no question as to whether any exhibits or any materials go substantially beyond these standards which is the legal test. And there's a pretty radical difference in going beyond and going substantially beyond. The reason that that word is put in there is

to make sure that First Amendment rights are not deprived.

And then when you add to that the evidence introduced by the defense, expert testimony by a truly competent expert that the materials do have social importance, that they do not appeal to a prurient interest and that they do not go beyond customary limits of candor, coupled with comparable exhibits that have been litigated and found to be not obscene, it clearly shows that the materials in this case could not be determined to be obscene and have such a finding sustained on appeal.

Finally, there's no evidence at all in here of any type of scienter that is required by the statute. Knowledge of obscenity has not been shown in any way.

And so, at this state of the evidence in the case, it's quite clear that the prosecution has not established its case beyond a reasonable doubt.

The whole evidence shows that the defendant is simply not guilty and that the materials are simply not obscene materials.

And so I think that your Honor at this point should grant the 1118.1 motion.

I'll submit it.

THE COURT: Mr. Imhoff?

MR. IMHOFF: Yes.

Well, I think everything counsel has said here goes more to the—you know, the weight of the testimony of the expert rather than to any lack of evidence. I think there's plenty of evidence, number one, in the record on the issue of scienter. The courts do not demand that the defendant know that the material is obscene in the constitutional sense, as long as he has some awareness of

the contents of the material, is somewhat aware of the obscene character of the matter.

So I think there's plenty of evidence in regard to his knowledge on that element. I don't think there's any question of the fact that the material was sold and distributed. Our expert did not base his testimony entirely on his survey. He based his testimony on his entire background, and his survey. In his discussions, also on his survey, he was able to make a determination not in whole on prurient appeal—but I'm sure that that was part of the determination of prurient appeal. All the people he's talked to throughout the state and his entire background in the field of vice and dealing with obscenity investigations—and I don't believe that defendant's expert—I would not consider him a well-qualified expert. He hasn't had any survey to speak of in regard to what the contemporary standards are, what prurient appeal is. All he did was talk to some people in the course of his work over a period of time. I think there's much less weight to be given to his testimony than the testimony of our expert.

I think everything counsel is pointing out here goes to the weight of the testimony which is something that the jury has to decide. There's no—I don't think it's possible at all to infer, if a conviction was had here, that it would not be sustained on appeal.

I think the motion should be denied.

MR. McDANIEL: Let me respond to that by pointing out that that argument doesn't go to the issues before the Court under a 1118.1 motion. The language of 1118.1 is quite specific: In a case tried before a jury, the court, on motion of the defendant or on its own motion, at the close of the evidence on either

side and before the case is submitted to the jury for decision, shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the Court is insufficient to sustain a conviction of such offense or offenses on appeal.

I think it's quite clear that, from the state of the evidence, any possible conviction would not be sustained on appeal. And that's the legal test under 1118.

So, again, I'll submit it.

MR. IMHOFF: I'll submit it.

THE COURT: Very well. The motion to dismiss under Section 1118.1 is denied.

Are you ready to proceed, gentlemen?

MR. IMHOFF: Yes.

THE COURT: All right.

Do you want the argument reported?

MR. IMHOFF: I don't care.

MR. McDANIEL: I don't know if it's necessary.

THE COURT: Do you want the instructions reported?

All right. The instructions will be reported. And the argument is not to be or is to be?

MR. McDANIEL: I think it better be.

(There was held a recess.)

(The following proceedings were held in open court:)

THE COURT: The case of People versus Murray Kaplan.

The record will show the defendant is represented by counsel, the People are present and represented, the jurors are all seated in their respective places in the jury panel box.

You may proceed, Mr. McDaniel.

MR. McDANIEL: The defense is happy to say we rest.

THE COURT: All right.

Will there be any rebuttal?

MR. IMHOFF: No, your honor, no rebuttal.

THE COURT: You rest your case?

MR. IMHOFF: Rest the case, yes, your Honor.

THE COURT: Very well.

Are you prepared for argument?

MR. IMHOFF: Yes, your Honor.

THE COURT: You may proceed.

(Closing arguments.)

THE COURT: (The following are jury instructions.)

Ladies and gentlemen of the jury:

It is my duty to instruct you in the law that applies to this case and you must follow the law as I state it to you.

As jurors, it is your exclusive duty to decide all questions of fact submitted to you and for that purpose to determine the effect and value of the evidence. In performing this duty you must not be influenced by pity for a defendant or by passion or prejudice against him. You must not be biased against a defendant because he has been arrested for this offense, or because a charge has been filed against him, or because he has been brought to trial. None of these facts is evidence of his guilt and you must not infer or speculate from any or all of them that he is more likely to be guilty than innocent.

In determining whether the defendant is guilty or not guilty, you must be governed solely by the evidence received in this trial and the law as stated to

you by the Court. You must not be governed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling. Both the People and the defendant have a right to expect that you will conscientiously consider and weigh the evidence and apply the law of the case, and that you will reach a just verdict regardless of what the consequences of such verdict may be.

You must not consider as evidence any statement of counsel made during the trial; however, if counsel for the parties have stipulated to any fact, or any fact has been admitted by counsel, you will regard that fact as being conclusively proved as to the party or parties making the stipulation or admission.

A "stipulation" is an agreement between attorneys as to matters relating to the trial.

As to any question to which an objection was sustained, you must not speculate as to what the answer might have been or as to the reason for the objection.

You must never speculate to be true any insinuation suggested by a question asked a witness. A question is not evidence and may be considered only as it supplies meaning to the answer.

You must not consider for any purpose any offer of evidence that was rejected, or any evidence that was stricken out by the Court; such matter is to be treated as though you had never heard of it.

Both the People and the defendant are entitled to the individual opinion of each juror.

It is the duty of each of you to consider the evidence for the purpose of arriving at a verdict if you can do so. Each of you must decide the case for yourself, but should do so only after a discussion of the evidence and instructions with the other jurors.

You should not hesitate to change an opinion if you are convinced it is erroneous. However, you should not be influenced to decide any question in a particular way because a majority of the jurors, or any of them, favor such a decision.

The attitude and conduct of jurors at the beginning of their deliberations are matters of considerable importance. It is rarely productive of good for a juror at the outset to make an emphatic expression of his opinion on the case or to state how he intends to vote. When one does that at the beginning, his sense of pride may be aroused, and he may hesitate to change his position even if shown that it is wrong. Remember that you are not partisans or advocates in this matter, but are judges.

If the Court has repeated any rule, direction or idea, or stated the same in varying ways, no emphasis was intended and you must not draw any inference therefrom. You are not to single out any certain sentence or any individual point or instruction and ignore the others. You are to consider all the instructions as a whole and are to regard each in the light of all the others.

The order in which the instructions are given has no significance as to their relative importance.

The testimony of a witness, a writing, a material object, or anything presented to the senses offered to prove the existence or nonexistence of a fact is either direct or circumstantial evidence.

Direct evidence means evidence that directly proves a fact, without an inference, and which in itself,* if true, conclusively establishes that fact.

Circumstantial evidence means evidence that proves a fact from which an inference of the existence of another fact may be drawn.

An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts established by the evidence.

It is not necessary that facts be proved by direct evidence. They may be proved also by circumstantial evidence or by a combination of direct evidence and circumstantial evidence. Both direct evidence and circumstantial evidence are acceptable as a means of proof. Neither is entitled to any greater weight than the other.

Every person who testifies under oath is a witness. You are the sole and exclusive judges of the credibility of the witnesses who have testified in this case.

In determining the credibility of a witness you may consider any matter that has a tendency in reason to prove or disprove the truthfulness of his testimony, including but not limited to the following:

His demeanor while testifying and the manner in which he testifies; the character of his testimony; the extent of his capacity to perceive, to recollect, or to communicate any matter about which he testifies; the extent of his opportunity to perceive any matter about which he testifies; the existence or nonexistence of a bias, interest, or other motive; the existence or nonexistence of any fact testified to by him; his attitude toward the action in which he testifies or toward the giving of testimony.

A witness willfully false in one material part of his testimony is to be distrusted in others. You may reject the whole testimony of a witness who willfully has testified falsely as to a material point, unless, from all

the evidence, you shall believe the probability of truth favors his testimony in other particulars.

However, discrepancies in a witness' testimony or between his testimony and that of others, if there were any, do not necessarily mean that the witness should be discredited. Failure of recollection is a common experience; and innocent misrecollection is not uncommon. It is a fact, also, that two persons witnessing an incident or a transaction often will see or hear it differently. Whether a discrepancy pertains to a fact of importance or only to a trivial detail should be considered in weighing its significance.

You are not bound to decide in conformity with the testimony of a number of witnesses, which does not produce conviction in your mind, as against the testimony of a lesser number or other evidence, which appeals to your mind with more convincing force. Testimony which you believe given by one witness is sufficient for the proof of any fact. This does not mean that you are at liberty to disregard the testimony of the greater number of witnesses merely from caprice or prejudice, or from a desire to favor one side as against the other. It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. It means that the final test is not in the relative number of witnesses, but in the relative convincing force of the evidence.

In your deliberations the subject of penalty or punishment is not to be discussed or considered by you. That is a matter which must not in any way affect your verdict.

A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a

reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal. This presumption places upon the State the burden of proving him guilty beyond a reasonable doubt. Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

Each count charges a separate and distinct offense. You must decide each count separately on the evidence and the law applicable to it, uninfluenced by your decision as to any other count. The defendant may be convicted or acquitted on any or all of the offenses charged. Your finding as to each count must be stated in a separate verdict.

You are not permitted to find the defendant guilty of any crime charged against him based on circumstantial evidence unless the proved circumstances are not only consistent with the theory that the defendant is guilty of the crime, but cannot be reconciled with any other rational conclusion and each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt has been proved beyond a reasonable doubt.

Also, if the evidence as to any particular count is susceptible of two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, it is your duty to adopt that interpretation which points to the defendant's innocence, and reject the other which points to his guilt.

A statement made by a defendant other than at his trial may be either an admission or a confession.

An admission is a statement by a defendant, which by itself is not sufficient to warrant an inference of guilt, but which tends to prove guilt when considered with the rest of the evidence.

A confession is a statement by a defendant which discloses his intentional participation in the criminal act for which he is on trial and which discloses his guilt of that crime.

You are the exclusive judges as to whether an admission or a confession was made by the defendant and if the statement is true in whole or in part. If you should find that such statement is entirely untrue, you must reject it. If you find it is true in part, you may consider that part which you find to be true.

Evidence of an oral admission or an oral confession of the defendant ought to be viewed with caution.

It is a constitutional right of a defendant in a criminal trial that he may not be compelled to testify. Thus the decision as to whether he should testify is left to the defendant, acting with the advice and assistance of his attorney. You must not draw any inference of guilt from the fact that he does not testify, nor should this fact be discussed by you or enter into your deliberations in any way.

In deciding whether or not to testify, the defendant may choose to rely on the state of the evidence and upon the failure, if any, of the People to prove every essential element of the charge against him, and no lack of testimony on defendant's part will supply a failure of proof by the People so as to support by itself a finding against him on any such essential element.

A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates.

Duly qualified experts may give their opinions on questions in controversy on a trial. To assist you in deciding such questions, you may consider the opinion with the reasons given for it, if any, by the expert who gives the opinion. You may also consider the qualifications and credibility of the expert.

In resolving any conflict that may exist in the testimony of expert witnesses, you should weigh the opinion of one expert against that of another. In doing this, you should consider the relative qualifications and credibility of the expert witnesses, as well as the reasons for each opinion and the facts and other matters upon which it was based.

You are not bound to accept an expert opinion as conclusive, but should give to it the weight to which you find it to be entitled. You may disregard any such opinion if you find it to be unreasonable.

In the crime charged in Counts I, II and III of the Complaint, there must exist a union or joint operation of act or conduct and a certain specific intent.

In the crime of selling or distributing obscene material, there must exist in the mind of the perpetrator the specific intent to distribute, or to exhibit or offer to distribute said material, and unless such intent so exists that crime is not committed.

The specific intent with which an act is done may be manifested by the circumstances surrounding its commission. But you may not find defendant guilty of the offenses charged unless the proved circumstances

not only are consistent with the hypothesis that he had the specific intent to distribute, or to exhibit or offer to distribute said material but are irreconcilable with any other rational conclusion.

Also, if the evidence as to such specific intent is susceptible of two reasonable interpretations, one of which points to the existence thereof and the other to the absence thereof, you must adopt that interpretation which points to its absence. If, on the other hand, one interpretation of the evidence as to such specific intent appears to you to be reasonable and the other interpretation to be unreasonable, it would be your duty to accept the reasonable interpretation and to reject the unreasonable.

I instruct you that the law in regard to any question involved in this case is only that which I give you in these instructions, and you are to disregard completely and totally ignore any statement, argument or contention concerning matters of law which you may have heard, seen or read or otherwise become aware of from any source other than these instructions.

You are instructed that every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this State for sale or distribution, this State prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor.

You are instructed that "knowingly" means having knowledge that the matter is obscene.

By "knowingly" is meant that the defendant must have known the contents of the material and must have been in some manner aware of its obscene character.

This requirement does not mean that the defendant must know that the matter would be held obscene by court of law.

You are instructed that "obscene" means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, or sex, or excretion which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance.

You are instructed that in the definition which I just read to you the following phrase is used: "The predominant appeal of the matter taken as a whole is to prurient interest, i.e., a shameful or morbid interest in nudity, sex or excretion."

Under the law herein, a prurient interest is only a shameful or morbid interest in sex, nudity or excretion, as distinguished from a candid and normal interest in sex, nudity or excretion.

Words and phrases must be construed according to the context and the approved usage of the language, ordinarily following the dictionary definitions.

Predominant is defined as holding an ascendancy, having superior strength, influence, authority or position, controlling. Appeal is defined as having a particular interest or attraction.

Shameful is defined as disgraceful, indecent.

Morbid is defined as unwholesome, not sound and healthful, diseased, gruesome.

Interest is defined as to engage or attract the attention of; a feeling that accompanies or causes special attention to some object, curiosity, concern.

The word "substantially" has been defined as greatly or considerably or largely.

The average person is, of course, a hypothetical person. The phrase means a person with an average interest in and attitude toward sex; not a libertine and not a person who rarely, if ever, thinks about sex; not a person who thinks sex is the most important thing to be discussed and not a person who thinks sex should never be discussed. The phrase means a normal individual of average sex instincts; not one who is under-sexed, not one who thinks sex is the most important factor in life, and not one who is afraid of sex or ignorant of sex or bored by sex. In short, the phrase "average person" means a normal, healthy, average adult man or woman with normal, healthy, average attitudes, instincts and interests concerning sex.

You are instructed that the term "utterly without social redeeming value" means that the material has no literary, scientific, or artistic value in its depiction of sex or nudity.

Material has social importance if it has the capacity to broaden man's range of sympathies or consciousness, or to enable him to see, hear or appreciate what he might otherwise have missed, or deepens his emotions, or makes life seem richer, more interesting or more comprehensible, or offers entertainment, or provides insights into man's relationship to the society in which he lives.

You are instructed that the burden of persuasion as to the lack of redeeming social value is on the prosecution. However, the burden of going forward with the production of evidence as to the existence of redeeming social value is on the defense.

Expert evidence is not required by either the prosecution or defense on this issue.

Under the law, the word "utterly" has been defined as follows: to an absolute or extreme degree; to the full extent; absolutely; altogether; entirely; fully; thoroughly; totally.

You are further instructed that for the purpose of determining the obscenity of the material here in question, the relevant community is the entire State of California.

Freedom of speech and of the press guaranteed by the Constitution embraces all information and education with respect to the significant issues of the times; embraces all issues about which information is needed or appropriate to enable the members of society to cope with the problems of their period.

Various exhibits have been introduced at this trial on the question of contemporary community standards.

These exhibits are composed of materials that have been found not obscene in other litigation.

Defendant's D and Defendant's E were materials found not to be obscene by the Municipal Court of Beverly Hills Judicial District. These decisions rendered by a court of equal jurisdiction are not binding on this Court but can be considered by you for whatever persuasive effect they may have.

Defendant's B were materials found not obscene by the Appellate Department of the Superior Court of Los Angeles County, and this decision is binding on this Court.

Defendant's C and Defendant's J were materials found not obscene by the Supreme Court of the United States. These decisions are binding on this Court.

The above materials were received in order to provide the jury with materials judicially determined to be within the customary limits of candor and to be used as a guideline by you in determining whether or not the materials involved herein are either within or beyond the contemporary standards of the community on a state-wide basis.

The question as to whether the alleged materials are in fact comparable to the material which is the subject of this litigation, to wit, People's 1, 2 and 5, is a question for the jury to determine.

Further, the question as to whether or not People's 1, 2 and 5 exceeds the standards indicated by the alleged comparable material is again a question for you, the jury, to determine.

I have not intended by anything I have said or done, or by any questions that I may have asked, to intimate or suggest what you should find to be the facts on any questions submitted to you, or that I believe or disbelieve any witness.

If anything I have done or said has seemed to so indicate, you will disregard it and form your own opinion.

You shall now retire and select one of your number to act as foreman, who will preside over your deliberations. In order to reach a verdict, all 12 jurors must agree to the decision. As soon as all of you have agreed upon a verdict, you shall have it dated and signed by your foreman and then shall return with it to this room.

Would you swear the bailiff, please?

(The bailiff was sworn to take charge of the jury.)

A JUROR: Can we see a copy of the instruction?

A JUROR: Can we have a written copy of your instructions?

THE COURT: No. We cannot send the instructions into the jury. But if you wish to have them reread at a future time, the Court will reread them.

A JUROR: Can you explain something now, your Honor? The question is: Will you go over again what is a reasonable doubt and beyond a reasonable doubt?

THE COURT: Do the other jurors wish me to read the definition of reasonable doubt?

Very well. All right. You may retire to the jury room.

(Whereupon, the jury retired to deliberate at 2:34 p.m.)

MR. McDANIEL: Can counsel approach the bench with the reporter, your Honor?

(The following proceedings were held in chambers:)

THE COURT: The record will show that the following proceedings are in chambers outside the purview of the jury.

MR. McDANIEL: I just wanted to make a specific objection to a couple of matters. My understanding had been, with regard to plaintiff's proposed instruction No. 5, that you would read just the first part which is:

"The predominant appeal of the matter taken as a whole is to prurient interest, i.e., a shameful or morbid interest in nudity, sex or excretion."

My notes clearly indicate that the rest of that particular instruction was going to be omitted, and that particularly is a definition of shameful as disgraceful or indecent and a definition of morbid as unwhole-

some, not sound and healthful, diseased and gruesome. Nevertheless, that instruction was read to the jury. I think that's improper. I think the jury should be instructed leaving that out because that is what was agreed upon in chambers in a hearing on this matter.

MR. IMHOFF: May I comment?

THE COURT: Yes, certainly.

MR. IMHOFF: Well, as I recall, I think counsel raised an objection to that at the time. But, as I recall, the decision of the Court was that it would read the whole thing and add defendant's definitions on "substantial" and on a couple of other definitions, "utterly" and so forth. As I recall, you did not reject that instruction in its entirety but you decided that you would read that and add his.

THE COURT: I can't recall.

MR. IMHOFF: I believe counsel's in error on it, but that's my recollection.

MR. McDANIEL: I don't think so. My notes here show that, with regard to 5, you would modify it so that there wouldn't be these extra verbiages in there to define shameful and morbid.

THE COURT: That was People's 5?

MR. McDANIEL: Yes.

THE COURT: On the—

MR. McDANIEL: Prurient interest aspect.

THE COURT: Well, the only note I put on No. 5 is, after I read the definition "The predominant appeal of the matter taken as a whole is to prurient interest, i.e., a shameful or morbid interest in nudity, sex or excretion"—then I put a parentheses to add defendant's 16 here. And, as I recall, I read 16 at that point. *

MR. McDANIEL: Yes, you did, and I think that there was the agreement reached that you weren't go-

ing to read the extra words to define morbid and shameful. It's instructive to note, for instance, that I mentioned that in my argument which I would obviously not have done if I was under the impression you were going to give that other set of terms. And I think that is improper and they should be reinstructed on that point.

THE COURT: Well, I don't recall—of course, we went over so many instructions. I don't recall whether or not that's the situation.

Perhaps, if the reporter will find it in her notes, I'll reinstruct.

MR. McDANIEL: I'm not trying to put any aspersions on this Court. I think the Judge knows me well enough to know that I wouldn't do that. It's just that I think this is one of those unfortunate things that sometimes happens when there's a great body of instructions and a lot of time spent going over them.

MR. IMHOFF: I recall counsel objecting at that point. But it is my recollection, as I said before, that you decided you'd read the whole thing and add his; that you wouldn't strike mine and then add his; that you would add his onto it. Of course, we'll just have to look in the record and—

THE COURT: Well, the only thing I can do—
Would you look in your record and see what you come up with on that?

(There was held a recess.)

(The following proceedings were held in open court:)

(The jury returned to the courtroom at 3:00 p.m. and the following proceedings were held:)

THE COURT: Case of People versus Murray Kaplan.

The record will show that the defendant is represented by counsel, the People are present and represented, the jurors are all seated in their respective places in the jury panel box.

In note by the change of position, Mr. Boyle, that you've been elected foreman; is that correct?

MR. BOYLE: Yes, sir.

THE COURT: I understand that the jury wishes to have some material read?

MR. BOYLE: We would like to have the charges read to us.

THE COURT: You mean the Complaint?

MR. BOYLE: Yes, sir. There were three, as we recall.

THE COURT: Very well.

MR. BOYLE: Your Honor, part of our problem is relating the evidence which we have in there to the charges. Are those exhibits—we want to know, partly, are those exhibits—for example, is Charge I related to Exhibit 1 in there?

THE COURT: All you're interested in is which exhibit is the subject matter of which count?

MR. BOYLE: That's it, and the reading of the charge, too.

THE COURT: You wish to have the Complaint read, and you want to know which exhibits apply to which—

MR. BOYLE: Yes, sir.

THE COURT: All right.

Municipal Court No. 337,520, the People of the State of California versus Murray Kaplan.

Comes now the undersigned and states that he is informed and believes, and upon such information and belief declares:

That on or about May 15, 1969, at and in the City of Los Angeles, in the County of Los Angeles, State of California, a misdemeanor, to wit: violation of Section 311.2 of the Penal Code of the State of California was committed by Murray Kaplan, who at the time and place last aforesaid, did willfully and unlawfully and knowingly send and cause to be sent, bring and cause to be brought into this State for sale and distribution, and in this State prepare, publish, print, exhibit, distribute, offer to distribute, and have in his possession with intent to distribute and to exhibit and offer to distribute, obscene matter, to wit: an obscene 8 millimeter film entitled "Tammy and Danny."

I believe Tammy and Danny is People's 5.

Count II. For a further, separate and second cause of action, being a different offense, belonging to the same class of crimes and offenses set forth in Count I hereof, affiant complains and says: That on or about the 14th day of May, 1969, at and in Los Angeles City, in the County of Los Angeles, State of California, a misdemeanor, to wit, violation of Section 311.2 of the Penal Code of the State of California was committed by Murray Kaplan, who at the time and place last aforesaid, did willfully and unlawfully and knowingly send and cause to be sent, bring and cause to be brought into this State for sale and distribution, and in this State prepare, publish, print, exhibit, distribute, offer to distribute, and have in his possession with intent to distribute and to exhibit and offer to distribute, obscene matter, to wit: an obscene magazine entitled "Yum-Yum."

That's People's 1.

For a further, separate and third cause of action, being a different offense, belonging to the same class

of crimes and offenses set forth in Counts I and II hereof, affiant complains and says: That on or about the 14th day of May, 1969, at and in Los Angeles City, in the County of Los Angeles, State of California, a misdemeanor, to wit: violation of Section 311.2 of the Penal Code of the State of California was committed by Murray Kaplan, who at the time and place last aforesaid, did willfully and unlawfully and knowingly send and cause to be sent, bring and cause to be brought into this State for sale and distribution, and in this State prepare, publish, print, exhibit, distribute, offer to distribute, and have in his possession with intent to distribute and to exhibit and offer to distribute, obscene matter, to wit: an obscene book entitled "Suite 69."

That's People's 2 in evidence.

Very well. Does that answer your question?

MR. BOYLE: I think so. Exhibit—there's a 4 in there, I believe. That's the photo.

THE COURT: The photo was in the box containing the reel of film at the time it was purchased. No. 3 is the box in which the item came.

MR. BOYLE: Thank you.

THE COURT: Very well. Are there any other questions, Mr. Boyle?

MR. BOYLE: No. That's all at this time, your Honor.

THE COURT: Thank you very much. You may retire.

(The jury retired to resume their deliberations at 3:07 p.m.)

(The jury returned to the courtroom at 4:30 p.m. and the following proceedings were had:)

THE COURT: Case of People versus Murray Kaplan.

The record will show that the defendant is represented by counsel, the People are present and represented, the jurors are all seated in their respective places in the jury panel box.

Ladies and gentlemen of the jury, it's now 4:30. I would assume that you have many, many things to discuss and that there would be no prospect of a verdict today.

THE FOREMAN: That is correct, sir.

THE COURT: Of course, it's my duty to make sure that the deliberations of the jury are completely untainted. I have the discretion to do one of two things: I can make sure that there are no outside discussions by imprisoning you in the opulence of the Biltmore Hotel or I can permit you to return to your homes.

Now, if I permit you to return to your homes, it would be necessary that you be admonished that you're not to discuss this matter in any group less than the entire panel. It would be improper for you, as you walk to the car, to discuss any of these matters in sub-groups of the total jury; that all your deliberations must be in the presence of one another in the jury deliberating room. Of course, you would not be permitted to discuss any of these matters when you are outside of the courtroom. And, of course, it would be improper for you to perform any experiments outside—well, it's improper for you to perform any experiments, period, such as attempting to find bookstores or look at material other than that that has been presented to you in this case.

If I were to permit you—firstly, let's determine which you would prefer. Would you rather go to the Biltmore Hotel or would you rather go home?

THE JURORS: Home.

THE COURT: All right. The record will show that there is unanimous response indicating that the jurors would prefer to go home.

If the Court permits you to go home, do you think you can follow these instructions and refrain from discussing these matters among yourselves or with anybody else until you return to the jury deliberating room tomorrow morning whereupon you will proceed where you left off today?

THE FOREMAN: Yes, sir.

THE COURT: All right. I'll accept your word.

For the record, you're admonished that you're not to discuss these matters among yourselves nor with anyone else, nor are you to form or express any opinion thereon until—of course, you've already expressed opinions. But you may not express any opinions thereon outside the deliberating room in groups of less than the total jury. And, of course, you're not to discuss any of these matters with anyone other than your fellow jurors.

You'll be excused at this time and ordered to report back to this court at 9:00 a.m. tomorrow morning without further order, notice or subpoena.

Upon all of the jurors assembling in the courtroom, the bailiff is instructed to usher them into the assembly room to resume their deliberations. Of course, you may not go into the assembly room unless you're all here; so it would behoove everybody to be here at the time indicated so that you can resume your deliberations where you left off.

All parties and witnesses in the Kaplan case are excused and ordered to report back tomorrow, 9:15 a.m.

State of California, County of Los Angeles—ss.

I, JOSIE COLBY, C.S.R., an Official Reporter of the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California, do hereby certify that the foregoing 513 pages comprise a true and correct partial transcript of the testimony taken and the proceedings had in the case of THE PEOPLE OF THE STATE OF CALIFORNIA VS. MURRAY KAPLAN, No. 337,520.

DATED this 16th day of May, 1971.

Official Court Reporter

STIPULATION

We hereby stipulate that the foregoing is a true and fair partial transcript of the testimony given and the proceedings had upon the trial in the above-entitled action.

DATED this day of, 1971.

.....
Attorney for Plaintiff-Respondent

.....
Attorney for Defendant-Appellant

I hereby certify that the foregoing transcript consisting of 513 pages is a true and correct partial transcript and the same is settled, allowed and made a part of the record of this case.

DATED this day of, 1971.

.....
JUDGE

Jury Instructions.

In the Municipal Court of Los Angeles Judicial District, County of Los Angeles, State of California. No. 337520.

People vs. Kaplan. CR. A 10391.

Filed June 22, 1971.

REFUSED

Filed 2-4-71 George J. Barbour, Clerk, By Joan G. Vanberg, Deputy.

I hereby certify this to be a true and correct copy of the original Jury Instructions refused on file in this office. WILLIAM H. McCLOUD, Clerk of Municipal Court of Los Angeles Judicial District, County of Los Angeles, State of California. By Barbara L. Stepnick Deputy.

The law presumes a defendant to be innocent of crime. Thus, a defendant, although accused, begins the trial with a "clean slate"—with no evidence against him. And the law permits nothing but legal evidence presented before the jury to be considered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit a defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt from all evidence in the case.

A reasonable doubt may arise not only from the evidence produced, but also from a lack of evidence. Since the burden is upon the prosecution to prove the accused guilty beyond a reasonable doubt of every essential element of the crime charged, a defendant has the right to rely upon failure of the prosecution to establish such proof. A defendant may also rely upon evidence brought out on cross-examination of witnesses for the prosecution. The law does not impose upon a defendant the duty of producing any evidence.

Griffin v. California, 380 U.S. 609, 85 S. Ct. 1229.

DEFT'S PROP. INST. NO. 1

Rejected as repetitious DJA

The question before you can never be: Will the prosecution win or lose the case? The prosecution always wins when justice is done, regardless of whether the verdict be guilty or not guilty.

Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L.Ed.1314.

DEFT'S PROP. INST. NO. 2

Rejected as formula DJA

The definition of "obscenity" includes a number of essential ingredients or conditions. The Court will now list these ingredients or conditions, but the Court would caution the jury at the outset that the material involved herein cannot be found obscene unless all the ingredients and conditions are present and applicable:

1. Material cannot be deemed obscene unless the material, taken as a whole, goes substantially beyond customary limits of candor, in the State of California as a whole, in the description or representation of matters pertaining to sex, nudity or excretion;
2. In addition, material cannot be deemed obscene unless, to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to the prurient interest;
3. In addition, material cannot be deemed obscene unless the material is utterly without redeeming social importance.

The Court will now explain to you the meaning and significance of each of the aforesaid ingredients of the definition of obscenity, but the Court repeats again that no material can be found to be obscene unless all of these ingredients or conditions are found to exist.

California Penal Code §311;

Jacobellis v. Ohio, 378 U.S. 184, 84 S.Ct. 1676,
12 L.Ed.2d 793.

DEFT'S PROP. INST. NO. 3

Rejected as repetitious & Formula DJA

You will note that there are several conditions specified in the definition of "obscenity" as I have given it to you. The mere fact that one or more of the conditions is present or applicable, as you judge the material herein, does not make such material obscene unless all the conditions for obscenity are present and applicable.

If the material does not, beyond a reasonable doubt, go substantially beyond customary limits of candor, in the State of California as a whole, in the description or representation of matters pertaining to nudity, sex or excretion, then the material may not be found obscene, even if the material are found by you to have no social importance or to appeal to the prurient interest of the average person.

If the material does not, beyond a reasonable doubt, appeal to the prurient interest of the average adult, then the material may not be found obscene, even if the materials are found by you not be found obscene, even if the materials are found by you to go substantially beyond the customary limits of candor, in the State of California as a whole, in the description or representation of matters pertaining to nudity, sex or excretion, or to have no social importance.

If material has social importance, then the material may not be found obscene, even if the material is found by you to appeal to prurient interest or to go substantially beyond the customary limits of candor, in the State of California as a whole, in the description or representation of matters pertaining to nudity, sex or excretion.

Jacobellis v. Ohio, 378 U.S. 184, 84 S.Ct. 1676,
12 L.Ed.2d 793.

DEFT'S PROP. INST. NO. 4

Rejected as repetitious & formula DJA

You are instructed that if you find that the material in question is not obscene within the legal meaning of that term as the Court has given it to you, then regardless of any and all other circumstances, you must find the defendant not guilty.

DEFT'S PROP. INST. NO. 5

Rejected as formula instruction DJA

Your own personal and social views on material such as that charged in the complaint may not be considered. Thus, whether you believe that the material is good or bad is of no concern; so, too you may not consider whether in your opinion the material is moral or immoral; whether it is likely to be helpful or injurious to the public morals. Similarly, whether you like or dislike the material, whether it offends or shocks you, may not be considered by you.

People v. Noroff, 67 C.2d 791, 433 P.2d 479, 63 Cal.Rptr. 575.

DEFT'S PROP. INST. NO. 6

Rejected as repetitive DJA

The population of the State of California reflects many different ethnic and cultural backgrounds, and the test for judging the obscenity of any material is a statewide standard. No lesser geographical framework for judging this issue may be used by you.

Manual Enterprises, Inc. v. Day, 370 U.S. 472, 82 S.Ct. 1432, 8 L.Ed.2d 639;

Jacobellis v. Ohio, 378 U.S. 184, 84 S.Ct. 167, 12 L.Ed.2d 793.

DEFT'S PROP. INST. NO. 8

Rejected as repetitious DJA

In judging the material herein, it is necessary to take into account customary limits of candor, in the State of California as a whole, in the description or representation of matters pertaining to sex, nudity or excretion. In this regard, you must consider what is going on, not what ought to be going on.

Jacobellis v. Ohio, 378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed.2d 793.

DEFT'S PROP. INST. NO. 9

Reject as repetitious DJA

The contemporary community standards to which the law makes reference are set by what is in fact accepted, and not by what some persons or groups of persons may believe the community as a whole ought to accept or refuse to accept.

Kingsley International Pictures Corp. v. Regents, 360 U.S. 684, 79 S.Ct. 1362, 3 L.Ed. 2d 1512.

DEFT'S PROP. INST. NO. 10

Rejected as argumentative DJA

The contemporary community standard of the State of California is set by what is in fact accepted in the community as a whole, and not by what some persons or groups of persons may believe the community as a whole ought to accept or refuse to accept. It is a matter of common knowledge, of which the Court takes judicial notice, that customs change; that the community may from time to time find acceptable that which

some particular segment of the population may regard as an unacceptable appeal to prurient interest.

See, Suggested Jury Instructions by the Honorable William C. Mathes, in 27 F.R.D. at 156.

DEFT'S PROP. INST. NO. 11

Rejected as argumentative DJA

In determining and applying the contemporary community standard, you have the right to consider what, as shown by the evidence, appears in contemporary magazines, books, newspapers, television, motion pictures, novels and other media of communication in the community.

See, Suggested Jury Instructions by the Honorable William C. Mathes, in 27 F.R.D. at 156;

Jacobellis v. Ohio, 378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed.2d 793;

Manual Enterprises, Inc. v. Day, 370 U.S. 478, 82 S.Ct. 1432, 8 L.Ed.2d 639.

To be rewritten.

DEFT'S PROP. INST. NO. 12

Rejected as repetitious DJA

It is a matter of common knowledge, of which the Court takes judicial notice, that people differ widely in their taste with regard to the propriety or desirability of motion pictures. What may appear to some people to be bad taste or offensive may appear to be amusing or entertaining to others. Obscenity is not a matter of

individual taste. The personal opinion of a juror that the material here in question is or is not offensive or in bad taste is not a sufficient or proper basis for a determination whether or not the material is obscene.

Hannegan v. Esquire, 327 U.S. 146, 66 S.Ct. 456, 90 L.Ed.586.

DEFT'S PROP. INST. NO. 13

Rejected as argumentative DJA

No arm of government—and that includes you acting as jurors has the power to suppress matter by subjective rather than by confining objective standards. You may not make your personal opinion the rule of judgment and approve or condemn the matter as it shall square with or differ from your own standards.

Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093;

Near v. Minnesota, 283 U.S. 697, 713, 51 S.Ct. 625, 75 L.Ed. 1357.

DEFT'S PROP. INST. NO. 14

Rejected as argumentative DJA

You may not rely on instinct in determining whether material is obscene. The ascertainment of obscenity cannot be a merely subjective reflection of the taste or moral outlook of individual jurors. The determination of obscenity cannot be made on the basis of the personal upbringing or restricted reflection or particular experience of life of the individual juror.

Mr. Justice Frankfurter concurring in

Smith v. California, 361 U.S. 147, 165, 80 S.Ct. 215, 225, 4 L.Ed.2d 205;

In re Giannini, 69 C.2d 563, 72 Cal.Rptr. 665.

DEFT'S PROP. INST. NO. 15

Rejected as argumentative DJA

In judging whether material is "obscene", the work must be considered as a whole, in its entirety. No material may be condemned as a whole merely because some passage, scene, excerpt or picture therein is deemed objectionable.

Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498.

DEFT'S PROP. INST. NO. 19

Rejected as repetitious DJA

All material under the law herein cannot be judged merely by the effect of an isolated scene upon particularly susceptible persons.

Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498.

DEFT'S PROP. INST. NO. 20

Rejected as reptitious DJA

The appeal of the material involved herein must be measured only by its appeal to the average adult person.

Butler v. Michigan, 352 U.S. 380, 77 S.Ct. 524, 1 L.Ed.2d 412.

DEFTS. PROP. INST. NO. 22

Rejected as repetitious DJA

Under the statute herein, only hard core pornography, as defined hereafter by the Court, can be found to be obscene.

Zeitlin v. Arnebergh, 59 C.2d 901, 383 P.2d 152, 31 Cal.Rptr. 800.

DEFT'S PROP. INST. NO. 25 •

Rejected as formula, argumentative & repetitive.

Hard core pornography means that type of material which consists principally of erotic objects; or photographs of men and women engaged in every conceivable form of normal and abnormal sexual relations and acts; of booklets containing drawings not only of normal fornication, but also of perversion of various kinds; and films showing people of both sexes engaged in orgies which include every form of sexual activity. Hard core pornography does not include material which is merely tasteless or coarse or offensive to the sensibilities of the reader or viewer.

Jacobellis v. Ohio, 378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed.2d 793;

Grove Press, Inc. v. Gerstein, 378 U.S. 577, 84 S.Ct. 1909, 12 L.Ed. 1305;

Roth v. United States, Brief on behalf of the United States by the Solicitor General, 37-38.

DEFT'S PROP. INST. NO. 26

Rejected as formula, argumentative & repetitive DJA

In determining whether or not the motion picture involved herein does or does not exceed contemporary standards or appeals to the prurient interest or is utterly without social importance, you must consider material that has been adjudicated as being not obscene.

In re Harris, 56 C.2d 879, 16 Cal.Rptr. 889 (1961).

DEFT'S PROP. INST. NO. 27

Rejected as formula DJA

Under the statute here involved material cannot be condemned solely upon the ground that it is allegedly obscene. If the material involved here was exhibited only to adults and if the material was not forced upon unwilling recipients, then the material is entitled to constitutional protection.

Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542;

Redrup v. New York, 386 U.S. 767, 87 S.Ct. 1414, 18 L.Ed.2d 515;

Rowan v. United States Post Office Department, 397 U.S. 728, 90 S.Ct. 1484;

Stein v. Batchelor, 300 F.Supp. 602 (D.C. Tex. 1969);

Karalexix v. Byrne, 306 F.Supp. 1393 (D.C. Mass. 1969);

United States v. Thirty-Seven (37) Photographs, 309 F.Supp. 36 (D.C. Cal. 1970);

United States v. Lethe, 312 F.Supp. 421 (D.C. Cal. 1970);

United States v. Reidel, No. 5845-HP (D.C. Cal.);

United States v. Langford, 315 F.Supp. 472 (D.C. Minn. 1970);

Sexual Freedom in Denmark, et al. v. Vavreck, et al., No. 4-70-Civil 273, unreported;

United States v. Orito, No. 70-Cr.-20, unreported;

Hayse, et al. v. Hoomissen, et al., Civ. No. 69-743 (D.C. Ore.), unreported;

United States v. B & H Dist. Corp., et al., 70-Cr. 67, unreported.

DEFT'S PROP. INST. NO. 28

Rejected as formula DJI.

The statute under which this prosecution is concerned requires knowledge by the defendant that the material named in the complaint was "obscene". At the time it was sold.

Smith v. California, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205;

Manual Enterprises, Inc. v. Day, 370 U.S. 478, 82 S.Ct. 1432, 8 L.Ed.2d 639;

New York Times Co. v. Sullivan, 376 U.S. 254, 284-288, 84 S.Ct. 710, 11 L.Ed.2d 686.

DEFT'S PROP. INST. NO. 29.

Rejected as repetitive DJA

Knowledge of the alleged obscenity of the material here cannot be inferred merely from the fact, that the defendant sold the material.

Smith v. California, 371 U.S. 147, 80 S.Ct. 215, 4 L.Ed. 2d 205;

Manual Enterprises, Inc. v. Day, 370 U.S. 472, 82 S.Ct. 1432, 8 L.Ed.2d 639;

Grove Press, Inc. v. Gerstein, 378 U.S. 577, 84 S.Ct. 1909, 12 L.Ed.2d 1305.

DEFT'S PROP. INST. NO. 30

Rejected as repetitious.

Even if you find that the defendant knew the material, dealt with the subject of sex or sexual deviation, that fact in itself is insufficient to support a finding that the defendant was aware of the obscene character of the material.

DEFT'S PROP. INST. NO. 31

Rejected as repetitious

Even if you should find that the defendant saw the materials and knew the contents, that fact by itself would be insufficient to support a finding that he had knowledge of the obscene character of the materials. This is so because many persons can have, and do have, good faith disagreement as to whether or not material is obscene.

Zeitlin v. Arnebergh, 59 C.2d 901, 383 P.2d 152, 31 Cal.Rptr. 800;

People v. Fritch, 13 N.Y.2d 119, 243 N.Y.S. 2d 1, 192 N.E.2d 713.

DEFT'S PROP. INST. NO. 32

Rejected as repetitious formula DJA

"Knowingly" means with knowledge or willfully. But the word "knowingly" also includes the meaning that the act is done with an evil motive or bad purpose. The use of the word "knowingly" assures that no one will be convicted because of mistake and inadvertence or other innocent reason.

Manual Enterprises, Inc. v. Day, 370 U.S. 472, 82 S.Ct. 1432, 8 L.Ed.2d 639.

DEFT'S PROP. INST. NO. 34

Rejected as repetitious DJA

Knowledge of the alleged obscenity of the materials here involved cannot be inferred merely from the depiction of nude bodies, male or female, including the genital and rectal areas and pubic hair.

Smith v. California, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205;

Manual Enterprises, Inc. v. Day, 370 U.S. 472, 82 S.Ct. 1432, 8 L.Ed.2d 639;

Grove Press, Inc. v. Gerstein, 378 U.S. 577,
84 S.Ct. 1909, 12 L.Ed.2d 1305.

DEFT'S PROP. INST. NO. 35

Rejected as formula DJA

In order to establish the offense charged in the complaint herein, the evidence must show beyond a reasonable doubt all of the following elements:

1. That the materials named in the complaint are obscene. That is to say, that the said materials, taken as a whole, go substantially beyond the customary limits of candor, in the Nation as a whole, in the description or representation of matters pertaining to sex, nudity or excretion; and in addition, that the dominant theme of each matter, to the average person, applying contemporary community standards, taken as a whole, appeals to the prurient interest; and in addition, that the materials are utterly without redeeming social importance.

2. That the defendant knew the contents of the materials named in the complaint.

3. That the defendant was aware of the obscene character of the materials named in the complaint, that is, that the defendant knew that the materials named in the complaint, taken as a whole, go substantially beyond the customary limits of candor, in the Nation as a whole, in the description or representation of matters pertaining to sex, nudity or excretion; and in addition, that the defendant knew that the predominant appeal of the materials, to the average person, applying contemporary community standards, taken as a whole, are to the prurient interest; and in addition, that the defendant knew that the ma-

materials are utterly without redeeming social importance.

4. That the defendant had the specific intent to appeal to the prurient interest of the average person viewing the materials named in the complaint.

As you have been instructed, the statute involved herein requires that the defendant had knowledge of obscenity, that is to say, that the defendant was aware of the obscene character of the material named in the complaint. In this connection, I instruct you that if you may consider the fact, if you find it to be a fact, similar materials have been exhibited in theaters and stores throughout the State of California as a whole.

DEFT'S PROP. INST. NO. 37

Rejected as formula DJA

The statute herein requires proof, in addition to knowledge of obscenity, of a specific intent to appeal to the prurient interest of the average person who may view the materials involved herein.

Manual Enterprises, Inc. v. Day, 370 U.S. 472,
82 S.Ct. 1432, 8 L.Ed.2d 639.

DEFT'S PROP. INST. NO. 38

Rejected as repetitious DJA

Neither sex nor nudity, in and of themselves, are synonymous with obscenity.

Manual Enterprises, Inc. v. Day, 370 U.S. 478,
82 S.Ct. 1432, 8 L.Ed.2d 639;

Jacobellis v. Ohio, 378 U.S. 184, 84 S.Ct. 1676,
12 L.Ed.2d 793.

DEFT'S PROP. INST. NO. 40

Rejected as repetitious & formula DJA

The mere fact that material depicts sexual activity, masturbation, male or female genitalia, bare buttocks or pubic hair is insufficient reason to condemn such material as obscene in law.

Bloss v. Dykema, 398 U.S. 278, 90 S.Ct. 1727, 27 L.Ed.2d 230;

Manual Enterprises, Inc. v. Day, 370 U.S. 478, 82 S.Ct. 1432, 8 L.Ed.2d 639;

United States v. "Language of Love", 432 F.2d 705 (2 Cir. 1970);

Pinkus v. Pitchess, 429 F.2d 416 (9 Cir. 1970), affirmed, 91 S.Ct. 185;

United States v. "I Am Curious-Yellow", 404 F.2d 196 (2 Cir. 1968);

United States v. One Carton "491", 367 F.2d 889 (2 Cir. 1966).

DEFT'S PROP. INST. NO. 42

Rejected as formula DJA

The free speech provisions of the Constitution of the United States guarantee accommodation for the widest varieties of tastes and ideas. What is good literature, what has educational value, what is refined public information, what is good art, varies with individuals as it does from one generation to another. A requirement that literature or art conform to some norm prescribed by an official smacks of ideology foreign to our society. From the multitude of competing offerings, the public will pick and choose. What seems to one to be trash will have for another some fleeting or even enduring values.

Hannegan v. Esquire, 327 U.S. 146, 66 S.Ct. 456, 90 L.Ed. 586.

DEFT'S PROP. INST. NO. 45

Rejected as argumentative & formula
DJA

The material here involved cannot be found obscene unless the proof shows beyond a reasonable doubt that the dominant theme of the material, taken as a whole, applying contemporary community standards, creates a clear and likely danger that it will bring about unlawful conduct on the part of the average person viewing such material. The degree of imminence of such unlawful conduct must be extremely high before material can be deemed without Constitutional protection.

Wood v. Georgia, 370 U.S. 375, 82 S.Ct. 1367, 8 L.Ed.2d 569.

DEFT'S PROP. INST. NO. 47

Rejected—Repetitious formula.

Literature and the arts are protected by the First Amendment. Materials which may deal with the subject of sex or the subject of nudity are as fully protected by the constitutional guarantees as are those which deal with other important subjects of our time.

Manual Enterprises, Inc. v. Day, 370 U.S. 478, 82 S.Ct. 1432, 8 L.Ed. 639;

Jacobellis v. Ohio, 378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed.2d 793.

DEFT'S PROP. INST. NO. 48

Rejected Formula DJA

Sex and obscenity are not synonymous. The portrayal of sex in art, literature and scientific works is not itself a violation of the statute. Sex is one of the vital problems of human interest and public concern.

The freedom of speech and the press guaranteed by the Constitution embraces the liberty to discuss pub-

licly and truthfully all matters of public concern, including sex.

Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed. 2d 1498.

DEFT'S PROP. INST. NO. 49

Rejected as formula DJA.

A work designed to entertain or amuse is as much entitled to the protection of free speech as a scientific or educational work.

Jos. Burstyn, Inc. v. Wilson, 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098;

Winters v. New York, 333 U.S. 507, 68 S.Ct. 665, 92 L.Ed. 840.

DEFT'S PROP. INST. NO. 50

Rejected as formula & argumentative DJA.

The Court instructs the jury that no defendant on trial for crime can be required to take the stand and testify against himself, to produce papers or to give information which he controls, or to prove the charge against him. This is his full legal right, and there is to be no presumption drawn against a man of any kind if he sees fit not to take the stand to testify. It is as much his right to sit still and say nothing as it is his right to walk down the street, and he is not to be criticized for exercising that right. The jury is instructed that a defendant has the right under the law not to testify, and therefore, as a matter of law, you, the jury, are not entitled to draw any adverse inferences whatsoever against a defendant because he exercised his privilege

accorded to him under the law of standing upon the case made against him by the government without being sworn or testifying in his own behalf.

Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106.

DEFT'S PROP. INST. NO. 53

Rejected as repetitious.

I again advise you that in applying present day community standards you must consider material that has been adjudicated as being not obscene. In this connection, you are instructed that the magazine entitled "Jay-bird Photographer No. 9" has been held by the United States Supreme Court to be not obscene and to be protected by the free speech and press provisions of the First and Fourteenth Amendments to the United States Constitution.

Bloss v. Dykema, 90 S.Ct. 1727 (June 1, 1970)

DEFT'S PROP. INST. NO. 54

Rejected-repetitious DJA.

In applying present day community standards, you must consider material that has been adjudicated as being not obscene. In this connection, I advise you that the books entitled "Adam and Eve", and have been held to be not obscene and to be protected by the free speech and press provisions of the First and Fourteenth Amendments to the United States Constitution by the Supreme Court of the United States. These books had been held by lower courts to be "filth for the sake of filth", but the Supreme Court of the United

States nevertheless held that the material was not obscene and entitled to constitutional protection.

Hoyt v. Minnesota, 90 S.Ct. 2241 (June 29, 1970), *rvrsg.* 174 N.W.2d 700.

DEFT'S. PROP. INST. NO. 55

Rejected—repetitious DJA

As I advised you, in applying present day community standards, you must consider material that has been adjudicated as being not obscene. Again, in this connection, I instruct you that the books entitled "Lurid Sinner", "Sin Crop" and "Sands of Shame" and the magazines "Niftees", Vol. 195 and "Peek-A-Boo", No. 4 have been held by the United States Supreme Court to be not obscene and to be protected by the free speech and press provisions of the First and Fourteenth Amendments to the United States Constitution. The trial court in Ohio had held the material to be obscene in all essential respects but the United States Supreme Court reversed and held that all the books and magazines were entitled to constitutional protection.

Walker v. Ohio, 90 S.Ct. 1884 (June 15, 1970).

DEF'S. PROP. INST. NO. 56

Rejected as formula, argumentative & outside scope of evidence herein DJA

I again advise you that in applying present day community standards you must consider material that has been adjudicated as being not obscene. In this connection, you are instructed that the magazines entitled "Candid", Vol. 8, No. 8, "Hefty", Vol. 2 No. 12, and "Nudist Way of Life", Vol. 1, No. 4 have been held

by the United States Supreme Court to be not obscene and to be protected by the free speech and press provisions of the First and Fourteenth Amendments to the United States Constitution.

Carlos v. New York, 90 S.Ct. 395 (December 8, 1969).

DEF'S. PROP. INST. NO. 57

Rejected as formula, argumentative & outside scope of evidence herein DJA

I advise you that the magazine "International Nudist Sun", Vol. 1, No. 5, which contains numerous photographs of naked adults, and makes no effort to conceal either male or female genitals, has been held by the California Supreme Court to be not obscene and entitled to constitutional protection under the First and Fourteenth Amendments to the United States Constitution and the free speech and press protective provisions of the California Constitution.

People v. Noroff, 67 Cal.2d 791, 433 P.2d 479, 63 Cal.Rptr. 575 (1967).

DEF'S. PROP. INST. NO. 58

Rejected as formula, argumentative & outside scope of evidence herein DJA

I advise you that four packets of photographs depicting nude females, and in which the subjects assume various poses which emphasize various parts of the body, have been held by the California Supreme Court to be not obscene and entitled to constitutional protection under the First and Fourteenth Amendments to the United States Constitution and the free speech and

press protective provisions of the California Constitution.

In re Panchot, 70 Cal.2d 105, 448 P.2d 385,
73 Cal.Rptr. 689 (1968).

DEF'S. PROP. INST. NO. 59

Rejected as formula, argumentative &
outside scope of evidence herein DJA

I advise you that the magazines "Les" and "Exciting" were held to be entitled to constitutional protection under the First and Fourteenth Amendments by the judgment of the United States Court of Appeals for the First Circuit, and that a subsequent petition for review to the United States Supreme Court by the State was denied by the Supreme Court. The federal court held that magazines consisting primarily of photographs, which depicted young women either largely or totally undressed, exposing various portions of their body, but generally focusing on the vulva, were not obscene.

Hunt v. Keriakos, 428 F.2d 606 (1 Cir. 1970)
cert. den. 91 S.Ct. 185 (November 23, 1970).

DEF'S. PROP. INST. NO. 60

Rejected as formula, argumentative &
outside scope of evidence herein DJA

You are instructed that the magazines "Eager Beaver" and "Fluff" were found not obscene by the app. dept. of the Superior Court. You are bound by that decision.

DEFENDANT'S PROPOSED INSTR.

No. 61

Rejected repetitious DJA

You are instructed that the magazines "The Foxes" and "Fantastic" were found not obscene by the Beverly Hills Municipal Court. You must give that decision persuasive weight in your deliberations.

DEFT'S PROPOSED INSTR. NO. 62

Rejected—repetitious DJA

All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinions—have the full protection of the guarantees of freedom of speech and press unless excludable because they encroach upon the limited idea of more important interests. Implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. Obscenity is not within the area of constitutionally protected speech or press.

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never thought to raise any constitutional problem. These include the lewd and obscene. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefits that may be derived from them are clearly outweighed by the social interests in order and morality.

Sex and obscenity are not synonymous. The portrayal of sex, e.g., in arts, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the

vital problems of human interest and public concern. On the other hand, obscene material is material which deals with sex in a manner appealing to prurient interest.

Roth v. United States, 354 U.S. 476

1 Lawyer's Edition 2d 1498

77 Supreme Court, 1304 at 1507, 1508

PLAINTIFF'S PROPOSED INSTRUCTION NO. 8.

Refused repetitive & argumentative.
DJA.

Verdict—Criminal.

In the Municipal Court of Los Angeles Judicial District, County of Los Angeles, State of California.

The People of the State of California, Plaintiff, vs. Murray Kaplan, Defendant. Case No. 337520 Div. 21.

We, the jury in the above-entitled cause, find the defendant Murray Kaplan Not Guilty of the offense charged, to wit: violation of Sec. 311.2 P.C. (Ct. I).
Dated February 2, 1971.

Bradley T. Boyle
Foreman

Filed June 22, 1971.

I hereby certify this to be a true and correct copy of the original verdict on file in this office. WILLIAM H. McCLOUD, Clerk of Municipal Court of Los Angeles Judicial District, County of Los Angeles, State of California. By Barbara L. Stepnick Deputy.

Verdict—Criminal.

In the Municipal Court of Los Angeles Judicial District, County of Los Angeles, State of California.

The People of the State of California, Plaintiff, vs. Murray Kaplan Defendant. Case No. 337520 Div. 21.

We, the jury in the above-entitled cause, find the defendant Murray Kaplan Guilty of the offense charged, to wit: Violation of Sec. 311.2 P.C. (Ct. III).

Dated February 3, 1971.

Bradley T. Boyle
Foreman

Filed June 22, 1971.

We hereby certify this to be a true and correct copy of the original verdict on file in this office. WILLIAM H. McCLOUD, Clerk of Municipal Court of Los Angeles Judicial District, County of Los Angeles, State of California. By Barbara L. Stepnick Deputy.

Verdict—Criminal.

In the Municipal Court of Los Angeles Judicial District, County of Los Angeles, State of California.

The People of the State of California, Plaintiff, vs. Murray Kaplan Defendant. Case No. 337520 Div. 21.

We, the jury in the above-entitled cause, find the defendant Murray Kaplan Not Guilty of the offense charged, to wit: Violation of Sec. 311.2 P.C. (Ct. II)

Dated Feb. 4, 1971.

Bradley T. Boyle
Foreman

Filed June 22, 1971.

I hereby certify this to be a true and correct copy of the original verdict on file in this office. WILLIAM H. McCLOUD, Clerk of Municipal Court of Los Angeles Judicial District, County of Los Angeles, State of California. By Barbara L. Stepnick Deputy.

Respondent's Brief on Rehearing.

Superior Court of the State of California for the County of Los Angeles, Appellate Department.

People of the State of California, Plaintiff and Respondent, -vs- Murray Kaplan, Defendant and Appellant. CR A 10391

I

PENAL CODE SECTION 311(A)(2) AND 312.1 ARE NOT APPLICABLE.

This court in affirming the conviction made reference to Penal Code Section 311(A)(2) which is an embodiment of *Ginzburg v. United States* [1966] 383 U.S. 463, 16 L.Ed.2d 31. At page 35, footnote 6 the United States Supreme Court refers to the fact the theory of the prosecution made the mode of distribution relevant to the determination of obscenity although there was not a federal "pandering obscenity" statute, the *Ginzburg* case was tried in the context of the circumstances of production, sale and publicity.

In the instant case this apparently was not the theory under which the appellant was prosecuted. The trier of fact was not instructed regarding Penal Code Section 311(A)(2). The prosecution did not argue this concept at trial and/or on appeal. The prosecution did present evidence of the circumstances surrounding the sale which evidence would be necessary to establish "sciemer." The advertising in the book would have been before the trier of fact as "part" of the book.

The trier of fact in reviewing the material alleged to be obscene could properly consider the advertising as an integral part of the book. The appellant made no request to "strike the advertising" from the book.

The trier of fact in considering the scienter evidence and the total book itself made a proper determination that the book was hard-core pornography.

At the time the appellant was arrested, Penal Code Section 311(A)(2) had not gone into effect. Respondent believes the court would be bound by *People v. Rosakos* [1968] 268 Cal.App.2d 497, 500 where that court said that "the seller's statement certainly cannot make that which is not obscene, obscene."

It should be noted that by citing *Rosakos* respondent is in no way conceding that the material herein is "not obscene." Respondent merely contends that if the book viewed in light of the scienter evidence is not hard-core pornography, then this court may not rely on Penal Code Section 311(A)(2) to find the book obscene.

In *People v. Noroff* [1967] 67 Cal.2d 791, 793 the court stated that the complaint "did not charge the defendants with pandering; second, the State Legislature has created no such crime." The enactment of Penal Code Section 311(A)(2) did not create a separate crime of pandering. The statute merely made certain evidence probative with respect to the nature of the matter.

Therefore, the case herein will have to be decided on the book per se, plus the evidence pertaining to scienter. While the evidence of circumstances surrounding the sale may properly have been considered by the trier of fact, respondent does not believe this court may rely on Penal Code Section 311(A)(2). This evidentiary rule was not in effect at the time the appellant was arrested.

This court also made reference to Penal Code Section 312.1. This statute also was not in effect at the

time appellant was arrested. Even if it had been in effect it is questionable whether it is applicable in that the prosecution did present expert testimony. The defense also put on an expert witness. By finding the appellant guilty, the jury obviously disregarded the defense expert and determined that the book was utterly without redeeming social value.

The defense expert was examined and cross-examined. By the cross-examination, the prosecution "destroyed" the contention that the book had redeeming social value. The prosecution was not required to present further evidence.

The prosecution complied with the requirements of *People v. Newton* [1970] 9 Cal.App.3d Supp. 24, 28. "Where the burden of persuasion as to lack of redeeming social value is on the prosecution, where the other elements of obscenity exist the burden of going forward should be and we feel is on the defendant."

Although appellant attempted to prove that the material had social importance, it was not incumbent upon nor mandatory for the prosecution to produce additional evidence. The jury was not bound to accept the defense evidence.

Respondent contends that while this court may have misapplied Penal Code Sections 311(A)(2) and 312.1 in this case the court did properly determine that the book was hard-core pornography. The judgment of conviction should be affirmed.

Respectfully submitted,
ROGER ARNEBERGH,
City Attorney
MICHAEL T. SAUER,
Assistant City Attorney
Attorneys for Respondent

COPY IN THE
Supreme Court of the United States

October Term, 1971
No. _____

Supreme Court, U. S.
FILED

MAY 1 1972

MICHAEL RODAK, JR., CLERK

MURRAY KAPLAN,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition for a Writ of Certiorari to the Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

STANLEY FLEISHMAN,

**6922 Hollywood Boulevard,
Hollywood, Calif. 90028,**

Attorney for Petitioner.

SAM ROSENWEIN,
Of Counsel.

SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	3
Constitutional and Statutory Provisions Involved ..	6
Statement	6
How Federal Questions 'Are Presented	7
Reasons for Granting the Writ	15
Conclusion	22

INDEX TO APPENDICES

Appendix A. Opinion and Judgment of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles	App. p. 1
Appendix B. Memorandum Opinion and Judgment of the Appellate Department Rendered Prior to Rehearing, and Subsequently Replaced by Opinion and Judgment (Appendix A)	10
Appendix C. Order of Appellate Department Correcting Judgment of Court	16
Appendix D. Order of Appellate Department Granting Petition for Rehearing	17
Appendix E. Order of Appellate Department Certifying Cause to Court of Appeal	18
Appendix F. Order of Court of Appeal Denying Transfer	20
Appendix G. Order Denying Writ of Habeas Corpus	21
Appendix H. Constitutional and Statutory Provisions Involved	22

TABLE OF AUTHORITIES CITED

Cases	Page
Aday v. United States, 388 U.S. 447	16, 21
Avansino v. New York, 388 U.S. 446	16
Bloss v. Dykema, 398 U.S. 278	21
Books, Inc. v. United States, 388 U.S. 449, rev. 358 F.2d 935 (1 Cir. 1966)	16, 21
Bouie v. City of Columbia, 378 U.S. 347	20
Central Magazine Sales, Ltd. v. United States, 389 U.S. 50	21
Childs v. Oregon, 401 U.S. 1006	16, 21
Cole v. Arkansas, 333 U.S. 196	20
Corinth Publications, Inc. v. Wesberry, 388 U.S. 448	16
DeJonge v. Oregon, 299 U.S. 353	19
Friedman v. New York, 388 U.S. 441	16
Garner v. Louisiana, 368 U.S. 157	19
Ginzburg v. United States, 383 U.S. 463	13
Grant v. United States, 380 F.2d 748 (9 Cir. 1967)	17
Grove Press, Inc. v. Christenberry, 276 F. 2d 433 (2 Cir. 1960), affg. 175 F.Supp. 488 (D.C. N.Y. 1959)	17
Grove Press, Inc. v. Gerstein, 378 U.S. 577	17
Haldeman v. United States, 340 F.2d 59 (10 Cir. 1965)	17
Hoyt v. Minnesota, 399 U.S. 524	8, 16
Jacobellis v. Ohio, 378 U.S. 184	9, 21
Luros v. United States, 389 F.2d 200 (8 Cir. 1968)	17, 21

Keney v. New York, 388 U.S. 440	16
Mazes v. Ohio, 388 U.S. 453	16
Memoirs v. Massachusetts, 383 U.S. 413	13, 17
People v. Noroff, 67 Cal.2d 791, 433 P.2d 469, 63 Cal.Rptr. 575 (1967)	11
Potomac News Co. v. United States, 389 U.S. 47 ..	21
Quantity of Copies of Books v. Kansas, 378 U.S. 205	16
Rabe v. Washington, 92 S.Ct. 993	20
Redrup v. New York, 386 U.S. 767	17, 21
Roth v. United States, 354 U.S. 487	15, 16, 17
Sheperd v. New York, 388 U.S. 444	16
Smith v. California, 361 U.S. 147	3
Speiser v. Randall, 357 U.S. 513	17
Spinar and Germain v. United States, 440 F.2d 1241 (8 Cir. 1971)	21
Stanley v. Georgia, 394 U.S. 557	22
Thompson v. City of Louisville, 362 U.S. 199	19
Thompson v. Utah, 170 U.S. 343	20
Tralins v. Gerstein, 378 U.S. 576	17
United States v. Baranov, 418 F.2d 1051 (9 Cir. 1966)	21
United States v. Dellapia, 433 F.2d 1252 (2 Cir. 1970)	22
United States v. Vuitch, 402 U.S. 62	18
United States v. West Coast News Co., 357 F.2d 855 (6 Cir. 1966)	21
Virginia Ry. Co. v. Mullins, 271 U.S. 220	3
Walker v. Ohio, 398 U.S. 434	16, 21

iv.

Rules	Page
California Rules of Court, Rule 24(a)	3
California Rules of Court, Rule 28(b)	3
California Rules of Court, Rule 62	3
California Rules of Court, Rule 63	11
California Rules of Court, Rule 63(a)	2, 14
California Rules of Court, Rule 63(3)	2, 14

Statutes

California Penal Code, Sec. 311	3, 4, 5, 6, 7
California Penal Code, Sec. 311(a)(2)	6, 10, 11, 14
California Penal Code, Sec. 311.2	3, 4, 5, 6, 7
California Penal Code, Sec. 312.1	10, 11, 13
California Penal Code, Sec. 1471	3
United States Code, Title 28, Sec. 1257(3)	3
United States Constitution, Art. I, Sec. 10	6
United States Constitution, First Amendment	3, 4, 5
.....	6, 7, 8, 9, 15, 19, 21
United States Constitution, Fourteenth Amendment	3, 4, 5, 6, 7, 8, 9, 15, 19, 21, 22

IN THE
Supreme Court of the United States

October Term, 1971

No.

MURRAY KAPLAN,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition for a Writ of Certiorari to the Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

Petitioner, Murray Kaplan, prays that a writ of certiorari issue to review the judgment and opinion of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles, entered in the above entitled case on February 7, 1972.

Opinions Below.

The opinion of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles is reported in 23 Cal.App.3d Supp. 9, 100 Cal.Rptr. 372. A copy of the opinion appears in Appendix A hereto. The memorandum opinion and judgment of the said Appellate Department of the Superior Court of the State of California for the County of Los Angeles, rendered prior to rehearing and subsequently replaced by the aforesaid opinion and judgment.

ment appearing in Appendix A hereto, was rendered on October 27, 1971. The said opinion is not reported and appears in Appendix B hereto. The order dated November 3, 1971, correcting a clerical error in the said judgment of October 27, 1971, is not reported. A copy of the order appears in Appendix C hereto.

Jurisdiction.

The judgment of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles (Appendix A) was entered on February 7, 1972.

The initial judgment of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles (Appendix B) was entered on October 27, 1971, and the order correcting the said judgment (Appendix C) was entered on November 3, 1971. Upon the filing of a due and timely petition for rehearing, an order was made by the said Appellate Department granting the petition for rehearing. The said order was entered on November 10, 1971, and is attached hereto as Appendix D.

Upon rehearing, the Appellate Department rendered its aforesaid judgment, entered on February 7, 1972, which appears as Appendix A hereto. On the same date the Appellate Department entered its order certifying the cause to the Court of Appeal pursuant to Rule 63(a) and (3), California Rules of Court. A copy of the said order certifying the cause to the Court of Appeal is attached hereto as Appendix E. On February 17, 1972, the Court of Appeal of the State of California, Second Appellate District, Division Three, made its order denying transfer of the cause. A copy of the said order appears hereto as Appendix F.

By the aforesaid denial of transfer by the Court of Appeal the Appellate Department of the Superior Court of the State of California for the County of Los Angeles became the highest court of the State in which a decision could be had.¹ See, California Penal Code §1471; California Rules of Court, Rule 62. See also, California Rules of Court, Rules 24(a) and 28(b); *Smith v. California*, 361 U.S. 147, 148, fn. 2; *Virginia Ry. Co. v. Mullins*, 271 U.S. 220, 222.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

Questions Presented.

1. Whether the book "Suite 69" by I. Smithson is entitled to the protections of the free speech and press provisions of the First and Fourteenth Amendments, and whether California Penal Code §§311 and 311.2, as construed and applied to punish the sale of said book by a retail book seller to an adult who requested and purchased the said book, render the state obscenity statutes unconstitutional, arbitrarily deprive this petitioner of his liberty and property without due process of law, and abridge petitioner's exercise of freedoms of speech and press, all contrary to the free speech and press and due process provisions of the First and Fourteenth Amendments.

2. Whether California Penal Code §§311 and 311.2, as construed and applied to authorize the judg-

¹A petition for a writ of habeas corpus was subsequently filed in the Supreme Court of the State of California and denied by that Court without opinion on April 12, 1972, Judge Mosk being of the opinion that the respondent should be ordered to show cause why the relief prayed for in the petition should not be granted. A copy of the order denying the petition for writ of habeas corpus is attached hereto as Appendix G.

ment of conviction of petitioner without any evidence in the record in support of an essential element of the offense, to wit, that the book was utterly without redeeming social importance, and where the only uncontroverted evidence offered by petitioner established by expert testimony that the book had social importance, deprive petitioner of his liberty and property without due process of law and abridge petitioner's exercise of freedoms of speech and press, contrary to the free speech and press and due process provisions of the First and Fourteenth Amendments.

3. Whether California Penal Code §§311 and 311.2, as construed and applied to authorize the judgment of conviction of petitioner herein upon the theory that proof of "pandering" may serve as a substitute for proof by the prosecution that the book is utterly without redeeming social importance, arbitrarily and capriciously deprive petitioner of his liberty and property without due process of law, deny petitioner the equal protection of the laws, and abridge petitioner's exercise of freedoms of speech and press, contrary to the free speech and press, due process, and equal protection provisions of the First and Fourteenth Amendments, when

(a) No charge of "pandering" was ever made in the complaint; the case was never tried upon such a theory; the jury was never instructed upon such an issue; and the prosecution itself conceded that the doctrine of "pandering" could not be appropriately invoked to affirm the conviction herein;

(b) State statutes which became effective long after the commission of the alleged offense were retroactively applied by the state court to punish the alleged conduct of "pandering", when such

conduct was not punishable under the laws of the State at the time of the commission of the alleged offense, and the highest court of the State had judicially determined that evidence of such conduct could not be used to support a conviction under the general obscenity statute; and

(c) The evidence in the record is barren of any proof of "pandering", as that concept has been interpreted by decisions of the United States Supreme Court.

4. Whether California Penal Code §§311 and 311.2, as construed and applied to authorize the judgment of conviction herein, where the standard for judging the alleged obscenity of the book was based upon the community standards of the State, and not upon the standards of the Nation as a whole, deprive petitioner of his liberty and property without due process of law and abridge petitioner's exercise of freedoms of speech and press, contrary to the free speech and press and due process provisions of the first and Fourteenth Amendments.

5. Whether California Penal Code §§311 and 311.2, as construed and applied to authorize the judgment of conviction of petitioner herein, where the sole evidence in the record establishes that petitioner, a retail book seller, sold the book to an adult who requested the book and purchased it, ostensibly for his personal use, and where the prosecution stipulated and conceded that petitioner neither sold the material in his bookstore to minors nor thrust it upon the general public and engaged in no "pandering" of the material, deprive petitioner of his liberty and property without due process of law and abridge petitioner's exercise of free-

doms of speech and press, contrary to the free speech and press and due process provisions of the First and Fourteenth Amendments.

Constitutional and Statutory Provisions Involved.

The pertinent provisions of the First and Fourteenth Amendments and Article I, Section 10, of the Constitution of the United States and the provisions of California Penal Code §§311 and 311.2 at the time of the commission of the alleged offense, and the provisions of California Penal Code §311(a)(2), which became effective after the commission of the alleged offense, appear in Appendix H hereto.

Statement.

On June 3, 1969, a three-count complaint was filed against petitioner in the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California, charging violations of California Penal Code §311.2, the state obscenity statute. The trial under the said complaint commenced on January 12, 1971, in the said municipal court before the Honorable David J. Aisensohn, a judge of the said court, and a jury. On February 4, 1971, the jury returned verdicts of acquittal as to two of the counts and returned a verdict of guilty solely with respect to the sale by petitioner of a paperback book entitled "Suite 69" to a police officer who had requested it [R.T. 54-55].²

²The reference "R.T." is to the Reporter's Transcript on appeal from the judgment of the municipal court to the Appellate Department of the Superior Court of the State of California for the County of Los Angeles. Copies of the book "Suite 69" are being lodged with the Court with the filing of this petition for writ of certiorari.

How Federal Questions Are Presented.

A. Prior to trial the petitioner demurred to the complaint upon the ground, among other things, that the California obscenity statute, California Penal Code §§311 and 311.2, on their face and as construed and applied by the said complaint, deprived petitioner of his rights of freedom of speech and press, due process of law, and equal protection of the laws, in violation of the First and Fourteenth Amendments. The demurrer having been overruled, the case proceeded to trial as aforestated.

At the trial it was established that petitioner is the owner of a bookstore located in the City of Los Angeles, County of Los Angeles, State of California. A police officer testified that he purchased the book from petitioner who was then working as a clerk in his bookstore [R.T. 35-59]. It was stipulated by the prosecution that the petitioner neither disseminated the material to minors nor thrust it upon the general public [R.T. 8]. The police officer who purchased the book stated that he had asked petitioner whether he had any good sexy books, and that petitioner had replied that all his books were sexy [R.T. 53]. The police officer asked if petitioner had any good paperback books, and petitioner replied that he was "reading one right now, and it is called 'Suite 69'".

Aside from the testimony of the aforesaid police officer, the only other testimony offered by the prosecution was by another vice officer who testified over objection [R.T. 122-123, 124, 131] that the material in question appealed to a prurient interest in sex and exceeded customary limits of candor [R.T. 136-139]. The prosecution offered no testimony that the book was

utterly without redeeming social importance. A motion for judgment of acquittal at the end of the prosecution's case was denied [R.T. 249].

On behalf of petitioner, Franklin Laven, an attorney [R.T. 286], testified that the book "Suite 69" does not exceed contemporary limits of candor, does not appeal to a prurient interest in sex, and has social importance [R.T. 326, 337-339]. The court received in evidence by way of judicial notice a book entitled "Adam and Eve", found to be constitutionally protected by the Court in *Hoyt v. Minnesota*, 399 U.S. 524 [R.T. 190, 379-380].

At the close of all the evidence, petitioner again moved for judgment of acquittal, which again was denied [R.T. 485-489]. Following the return of the verdict and the denial of petitioner's motion for a new trial, petitioner was granted probation for a period of three years, on condition that he spend thirty days in the county jail and pay a fine of \$1,000.

B. A due and timely appeal was prosecuted by petitioner to the Appellate Department of the Superior Court of the State of California for the County of Los Angeles. The questions presented on appeal included the following: (1) That the book "Suite 69" is not obscene and that the state obscenity statute, as construed and applied, violated the free speech and press, due process, and equal protection provisions of the First and Fourteenth Amendments and the interpretive decisions of the Court and the rulings of other federal and state courts holding comparable books to be entitled to constitutional protection; (2) That the prosecution had failed to present any evidence in support of an essential element of the offense, to wit, that the book was

utterly without redeeming social importance, and that the statute, as construed and applied to authorize the judgment of conviction upon an uncontroverted record showing that the book was not utterly without redeeming social importance, violated the free speech and press, due process, and equal protection provisions of the First and Fourteenth Amendments; (3) That the statute, as construed and applied to authorize the judgment of conviction based upon a state community standard, and not upon a national standard, violated the free speech and press, due process, and equal protection provisions of the First and Fourteenth Amendments; and, (4) That the statute, as construed and applied to authorize the judgment of conviction without any evidence to establish that the book appealed to the prurient interest of the actual or intended audience, or went substantially beyond contemporary limits of candor measured by community standards in the Nation as a whole, violated the free speech and press, due process, and equal protection provisions of the First and Fourteenth Amendments.

C. On October 27, 1971, the Appellate Department of the Superior Court of the State of California for the County of Los Angeles filed a memorandum opinion and judgment, affirming the conviction (Appendix B). With respect to the issue as to the appropriate community standard, the court declined to follow the ruling of the Court in *Jacobellis v. Ohio*, 378 U.S. 184. The court held that "the arguments against a nation-wide standard outweigh those in favor" and that "the state-wide standard applied to all forms of alleged obscenity" (App. B., p. 11).

With respect to the issue of the failure of the prosecution to adduce any evidence that the book was ut-

terly without social importance, and the fact that petitioner had presented uncontroverted expert evidence that the book had social importance, the Appellate Department asserted that the failure of proof was not fatal. The reasoning of the court was that California had enacted new legislation, California Penal Code §311-(a)(2), effective November 10, 1969, some six months after the commission of the alleged offense herein, which provided that in obscenity prosecutions, where the circumstances of production, purchase, sale, dissemination, distribution or publicity indicated that matter was "being commercially exploited by the defendant for the sake of its prurient appeal", such evidence was probative with respect to the nature of the matter and could "justify the conclusion that the matter is utterly without redeeming social importance". Based upon such statute and upon another recent statute, California Penal Code §312.1, which abolished the requirement of expert testimony, the Appellate Department concluded that the conversation between the police officer and petitioner, and the advertisements in the back of the book, amounted to "pandering", and since the jury now had the right to disregard expert opinion, the jury was justified in finding that the prosecution had sustained its burden of proving that the material was utterly lacking in social importance (App. B., pp. 12-14). It should be noted at this point that the complaint against petitioner never made any charge of "pandering"; the case was never tried on a theory of "pandering"; the jury was never instructed that it could consider evidence of "pandering" in reaching a verdict; and, indeed, the prosecution in its brief on rehearing conceded that the concept of pandering could not be constitutionally applied to petitioner. The court

also rejected the contention that the book "Suite 69" is not obscene. Without indicating the distinction between the book herein and comparable books found to be constitutionally protected by this Court, the Appellate Department held that "Suite 69" was obscene and not entitled to constitutional protection.

D. Following the rendition of the aforesaid judgment of October 27, 1971, petitioner filed a due and timely petition for rehearing or, in the alternative, for certification of transfer to the Court of Appeal, pursuant to Rule 63 of the California Rules of Court. It was argued in the first place that the Appellate Department had mistakenly relied upon statutes passed after the commission of the alleged offense in order to justify the affirmance of the conviction upon the doctrine of "pandering" as a substitute for evidence in the record that the book was utterly without redeeming social importance. The petitioner pointed out that California Penal Code §§311(a)(2) and 312.1 did not become effective until November 10, 1969, and that the commission of the offense as charged in the complaint of June 3, 1969, allegedly occurred on May 14, 1969, some six months before the passage of the said statutes. Moreover, the Supreme Court of California had held some two years before that the doctrine of pandering could not be invoked where no such charge was contained in the accusation and where the state legislature had created no such crime. *People v. Noroff*, 67 Cal.2d 791, 433 P.2d 469, 63 Cal.Rptr. 575 (1967).

The attention of the court was called to the fact that the charge of pandering had never appeared in the accusation in the case herein; that the case was never tried on a theory of "pandering"; that the proof did

not establish such "pandering"; and that the jury had never been instructed upon any such theory. It was urged that the court had failed to recognize that there was a complete absence of proof in the record of an essential element of the offense, to wit, that the book was utterly without redeeming social importance. Petitioner urged upon the court that its judgment deprived petitioner of his liberty without due process of law and unconstitutionally subjected him to an *ex post facto* application of the laws.

Petitioner also urged upon the court that the book herein involved was not different in the constitutional sense from the books held to be constitutionally protected by this Court.

E. The aforesaid petition for rehearing was granted by the Appellate Department on November 10, 1971 (Appendix D). In respondent's brief on rehearing, it was conceded that petitioner had not been prosecuted under any theory of pandering; that instructions had not been given to the jury on such issue; and that the prosecution "did not argue this concept at trial and/or on appeal" (Respondent's Brief on Rehearing, p. 2). The prosecution admitted that "the case herein will have to be decided on the book *per se*, plus the evidence pertaining to scienter" (*Ibid.*, p. 3). In short, the prosecution agreed that the court had misapplied the California statutes enacted after the commission of the alleged offense, but argued that the judgment should be affirmed in any event.

On February 7, 1972, the Appellate Department, following rehearing, filed its second opinion and judgment and again affirmed petitioner's conviction (Appendix A). In most respects the court merely reiterated

its prior opinion. The Appellate Department held that the book "Suite 69" is obscene and not entitled to constitutional protection; that the appropriate community standard is that of the State rather than the Nation as a whole, even in a case involving a book intended for nation-wide dissemination; that the question of prurient appeal need not be measured by the book's impact upon its actual and intended audience, even though the prosecution had stipulated that the petitioner neither disseminated the book to minors nor thrust it upon the general public; that the burden of persuasion rested initially with an accused in an obscenity prosecution on the issue of redeeming social value; that although the only evidence in the record on the issue of social value had been produced by petitioner, nevertheless the statute enacted after the commission of the alleged offense (California Penal Code §312.1) authorized the jury to disregard such testimony; and that the prosecution had sufficiently met its burden on the element of social value when evidence of "pandering" appeared in the record. The court held that the concept of pandering enunciated by this Court in *Ginzburg v. United States*, 383 U.S. 463, and reiterated in *Memoirs v. Massachusetts*, 383 U.S. 413, must always have been deemed to be the law in California; that the statutes enacted after the commission of the alleged offense herein merely codified such pre-existing law; and that therefore the retroactive application of the statutes did not deprive petitioner of his liberty without due process of law nor his right to a jury trial, did not subject him to any *ex post facto* application of the laws nor subject petitioner to deprivation of his liberty on a charge never made and a theory never tried.

F. On the same date as the rendition of the aforesaid judgment, the Appellate Department filed an order certifying the cause to the Court of Appeal, pursuant to Rule 63(a) and (3), California Rules of Court (Appendix E). The Appellate Department stated in its certification that the transfer "appears necessary to settle important questions of law". The questions so presented were: (1) Is the proper community standard in an obscenity prosecution for sale of a book that of the State of California or a national standard?; (2) Is it proper to place the burden of going forward with evidence as to the redeeming social value of matter which meets the tests of appeal to prurient interest and exceeding customary standards on the defendant?; (3) If the answer to the previous question is in the affirmative, what is the burden of the People in meeting defendant's evidence of redeeming social value?; (4) In California may evidence of the circumstances of production, presentation, sale, dissemination, distribution or publicity constitute sufficient evidence of lack of redeeming social value either under the case of *A Book v. Attorney General (Memoirs)* [1966] 383 U.S. 413, 420 [16 L.Ed.2d 1, 6, 86 S.Ct. 975] or under Penal Code Sec. 311(a)(2)?; and, (5) May Penal Code Sec. 311(a)(2) be applied in a prosecution for sale or distribution of obscene matter where the sale or distribution occurred before the effective date of such provision?

On February 17, 1972, the Court of Appeal of the State of California, Second Appellate District, Division Three, made its order denying transfer of the cause (Appendix F).

REASONS FOR GRANTING THE WRIT.

1. The book "Suite 69" is not obscene and is entitled to constitutional protection under the First and Fourteenth Amendments to the Constitution and the interpretive decisions of this Court. The book contains no illustrations and its language plainly does not exceed contemporary community standards and the limits of tolerance which the community as a whole today gives to writing about sex and sex relations. The frankness with which sex and sex relations are dealt with at the present time is evident in all media of public expression, in the kind of language used and subjects discussed in every area of society, in theaters, films, books, advertisements, dress, and in many other ways familiar to the community. The book does not appeal to a shameful or morbid interest in sex and is not utterly without social importance. Moreover, the uncontroverted evidence in the record establishes that the book has social importance. Measured by the constitutional standards for judging obscenity, as enunciated and applied by this Court, the book is not obscene and is entitled to the protection of the First Amendment.

Language equally explicit and, indeed, even more candid than the language contained in the book herein has been held to be entitled to constitutional protection in decisions of this Court and the lower courts since *Roth* and until the most recent term of the Court. Explicit descriptions of sex relations in books, periodicals and other media of communication are plainly tolerated by the community generally.

In the light of the requirements of the First and Fourteenth Amendments and the interpretive decisions of this Court with respect to books indistinguishable in

content from the book here involved, it is submitted that the judgment of conviction here, imposing fine and imprisonment upon petitioner, cannot stand consistent with the guarantees of the fundamental law. This Court has emphasized again and again that "sex and obscenity are not synonymous". *Roth v. United States*, 354 U.S. at 487. Under any conceivable constitutional standard for judging obscenity, the book herein is not obscene and is entitled to constitutional protection. See, *Childs v. Oregon*, 401 U.S. 1006 ("Lesbian Room-mate"); *Walker v. Ohio*, 398 U.S. 434 ("Lurid Sinner", "Sin Crop", "Sands of Shame"); *Hoyt v. Minnesota*, 399 U.S. 524 ("The Way of a Man With a Maid", "Adam and Eve", "Business as Usual", "Lady Susan's Cruel Lover", "True Love Stories of Growing Up"); *Quantity of Copies of Books v. Kansas*, 378 U.S. 205 ("Sin Hooked", "Bayou Sinners", "Lust Hungry", "Shame Shop", "Fleshpot", "Sinners Seance", "Passion Priestess", "Penthouse Pagans", "Shame Market", "Sin Warden", "Flesh Avenger"); *Aday v. United States*, 388 U.S. 447 ("Sex Life of a Cop"); *Books, Inc. v. United States*, 388 U.S. 449 ("Lust Job"); *Corinth Publications, Inc. v. Wesberry*, 388 U.S. 448 ("Sin Whisper"); *Keney v. New York*, 388 U.S. 440 ("Sin Servant", "Lust School", "Lust Web"); *Mazes v. Ohio*, 388 U.S. 453 ("Orgy Club"); *Friedman v. New York*, 388 U.S. 441 "Bondage Boarding School", "English Spanking School", "Bound and Spanked", "Sweeter Gwen", "Traveling Saleslady Gets Spanked", "Bound to Please", "Bizarre Summer Rivalry", "Heatwave", "Escape Into Bondage"); *Sheperd v. New York*, 388 U.S. 444 ("Promenade Bondage", "Spanking Nurses", "Spanking Sisters", "Bondage"); *Avansino v. New York*, 388 U.S. 446 ("Promenade Bondage, Vol. 4");

Redrup v. New York, 386 U.S. 767 ("Lust Pool", "Shame Agent"); *Memoirs v. Massachusetts*, 383 U.S. 413 ("Fanny Hill"); *Grove Press, Inc. v. Gerstein*, 378 U.S. 577 ("Tropic of Cancer"); *Tralins v. Gerstein*, 378 U.S. 576 ("Pleasure Was My Business"). See also, *Grove Press, Inc. v. Christenberry*, 276 F.2d 433 (2 Cir. 1960), affg. 175 F.Supp. 488 (D.C. N.Y. 1959) ("Lady Chatterley's Lover"); *Haldeman v. United States*, 340 F.2d 59 (10 Cir. 1965); *Grant v. United States*, 380 F.2d 748 (9 Cir. 1967); *Luros v. United States*, 389 F.2d 200 (8 Cir. 1968) ("Lesbian Sin Song", "Two Women in Love", "Pleasure House", "Lesbian Alley", "The Three Way Apartment", "The Affairs of Gloria").

2. The record is barren of any evidence to establish that the book herein is utterly without redeeming social importance. The only evidence in the record, uncontroverted, is that the book does have social importance. The conviction of petitioner, therefore, for a violation of the state obscenity statutes rests upon a record devoid of evidence to support petitioner's alleged guilt and constitutes, it is submitted, a plain denial of due process.

Where the "transcendent value of speech" is involved, due process requires "that the State bear the burden of persuasion to show that the [accused] engaged in criminal speech". *Speiser v. Randall*, 357 U.S. 513, 526. In *Memoirs v. Massachusetts*, 383 U.S. 415, this Court emphasized the importance of the "three federal constitutional criteria" for judging the alleged obscenity of material (383 U.S. at 419). With respect to the *Roth* definition, the Court also stressed the following: "Under this definition, as elaborated in subsequent cases, three elements must coalesce: *it must be established*

that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." (383 U.S. at 418) (Emphasis added).

It follows from the aforesaid principles that an essential element of the offense of obscenity demanded by the Constitution is evidence that material involved is utterly without redeeming social importance. It follows also that the prosecution in all such cases is constitutionally required to plead and prove all the essential elements of the offense. It is contrary to law and the Constitution to judicially improvise a presumption that material which appeals to prurient interest and exceeds customary limits of candor is necessarily utterly without redeeming social importance. Such an irrational presumption violates due process and undermines the presumption of innocence. In *United States v. Vuitch*, 402 U.S. 62, this Court held that under a law which prohibited abortion unless "necessary for the preservation of the mother's life or health", the burden was on the prosecution to *plead and prove* that abortion was not necessary for such purposes.

Moreover, it is inadmissible, it is submitted, to permit the prosecution to rely solely upon the material itself with respect to the issue of socially redeeming importance. It cannot be assumed that triers of the facts are necessarily familiar with what has literary, artistic, historical, psychological, educational, entertaining, or other social value and importance. To sanction convictions without evidence in support of every essential element of the offense in an obscenity prosecution is to

encourage the trier of facts to condemn as obscene material deemed subjectively to be without value to the particular juror or judge.

The effect of the ruling of the Appellate Department is to permit a judgment of conviction in an obscenity prosecution without the slightest proof, directly or indirectly, to establish an essential element of the offense, to wit, the utter lack of social value of the material. Conviction of a crime without any evidence in the record to support the accused's guilt not only constitutes a denial of due process, but an abridgment of the exercise of freedoms of speech and press protected by the First and Fourteenth Amendments. *Garner v. Louisiana*, 368 U.S. 157, 173-174; *Thompson v. City of Louisville*, 362 U.S. 199, 204-206.

3. The state court has upheld the void conviction of petitioner here by devising a concept of "pandering" which has no basis in fact or in law in the case herein, and which results in the deprivation of petitioner's constitutional rights.

In the first place, it should be emphasized again that no charge of "pandering" was ever made in the complaint; the case was never tried upon such a theory; the jury was never instructed upon such an issue; and the prosecution itself conceded before the Appellate Department that the doctrine of pandering could not be appropriately invoked to affirm the conviction herein. This Court has emphasized again and again that conviction upon a charge not made is the sheerest denial of due process of law. *DeJonge v. Oregon*, 299 U.S. 353, 362. This Court has also held that conviction of a charge on which an accused was never tried is as much a violation of due process as it is to convict him

upon a charge that was never made. *Cole v. Arkansas*, 333 U.S. 196, 201. At this very term of Court a judgment of conviction was reversed where a statute, as construed and applied, failed to give the accused fair notice that certain conduct was proscribed. *Rabe v. Washington*, 92 S.Ct. 993.

Moreover, without conceding the validity of the state statutes which became effective long after the commission of the alleged offense by the petitioner, it is plain that the attempt to apply such statute to petitioner in order to support the conviction here runs counter to fundamental principles embodied in the Constitution. It has long been held that a statute, on its face and as construed and applied, comes within the constitutional prohibition of *ex post facto* laws when, by its necessary operation and “‘in its relation to the offense, or its consequences, alters the situation of the accused, to his disadvantage’”. *Thompson v. Utah*, 170 U.S. 343. Indeed, “an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. I §10, of the Constitution forbids”. *Bouie v. City of Columbia*, 378 U.S. 347, 353. What the court below has held is that petitioner could be convicted on the basis of alleged conduct which concededly was not proscribed at the time of the commission of the alleged offense, and which the highest court of the State had held could not be used to support a conviction under the general obscenity statute. At the time of the commission of the alleged offense, the petitioner here had “no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial construction”. *Bouie v. City of Columbia*, 378 U.S. at 352.

Finally, wholly apart from the fact that no charge of "pandering" was ever made or tried before the jury, and the retrospective action of the court below violates fundamental principles of due process and guarantees against *ex post facto* laws, there was no proof of "pandering" in the case herein. Petitioner's statement to the police officer at the time of purchase, that he had "sexy" books, and the advertisements in the back of the book, taken separately or together, could hardly be deemed sufficient to support a finding of "pandering" as this Court has interpreted the concept. See, *Redrup v. New York*, 386 U.S. 767; *Aday v. United States*, 388 U.S. 447, reversing *sub nom. United States v. West Coast News Co.*, 357 F.2d 855 (6 Cir. 1966); *Books, Inc. v. United States*, 388 U.S. 449, reversing 358 F.2d 935 (1 Cir. 1966); *Childs v. Oregon*, 401 U.S. 1006; *Bloss v. Dykema*, 398 U.S. 278; *Walker v. Ohio*, 398 U.S. 524; *Central Magazine Sales, Ltd. v. United States*, 389 U.S. 50; *Potomac News Co. v. United States*, 389 U.S. 47. See also, *United States v. Baranov*, 418 F.2d 1051 (9 Cir. 1969); *Spinar and Germain v. United States*, 440 F.2d 1241 (8 Cir. 1971); *Luros v. United States*, 389 F.2d 200 (8 Cir. 1968).

4. The court below declined to follow the ruling of the Court in *Jacobellis v. Ohio*, 378 U.S. 184. The Appellate Department held, in effect, that there is greater latitude for state action under the word "liberty" under the Fourteenth Amendment than is allowed to Congress by the language of the First Amendment. The adoption of the community standards of a State, as opposed to the standards of the Nation as a whole, can only result in deterring expression and undermining the guarantees contained in the First Amendment, subsumed

into the due process clause of the Fourteenth Amendment as a limitation upon state action. The constitutional limits of free expression in the Nation should not, it is submitted, vary with state lines, a principle which is of transcendent importance to the security of the Nation in this contemporary era.

5. The book herein involved was sold to an adult who requested the book and purchased it ostensibly for his personal use. It was stipulated by the prosecution that petitioner neither sold the material in his bookstore to minors nor did he thrust it upon the general public. The prosecution also conceded that no pandering was involved in the case and, indeed, there was no evidence with respect thereto. Thus, the State herein showed no special circumstance that would justify the prosecution of petitioner in the face of the decision by this Court in *Stanley v. Georgia*, 394 U.S. 557, and petitioner's conduct was therefore protected, it is submitted, by the provisions of the First and Fourteenth Amendments. See, *United States v. Dellapla*, 433 F.2d 1252 (2 Cir. 1970).

Conclusion.

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

Respectfully submitted,

STANLEY FLEISHMAN,
Attorney for Petitioner.

SAM ROSENWEIN,
Of Counsel.

APPENDIX A.

Opinion and Judgment of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

People of the State of California, Plaintiff and Respondent, vs. Murray Kaplan, Defendant and Appellant. Superior Court No. CR A 10391 Municipal Court of the Los Angeles Judicial District No. 337520.

MEMORANDUM OPINION AND JUDGMENT

Appeal by defendant from judgment of the Municipal Court, David J. Aisenson, Judge.

Judgment affirmed.

For Appellant—Stanley Fleishman, Inc., by David M. Brown.

For Respondent—Roger Arnebergh, City Attorney by Madeleine Flier, Deputy City Attorney.

Appellant states twenty-one grounds for appeal, many of which are overlapping and some (e.g., V, VI, XVIII, XX, and XXI) so vague and general as to be useless in pointing out specific grounds for reversal. In his brief he gets down to three which we may summarize as follows: (1) The book "Suite 69" is not obscene; (2) The prosecution failed to present any evidence that the book is utterly without redeeming social importance, whereas, defendant presented expert testimony that it did have some social importance; (3) That the trial court applied the wrong "community standard."

We will discuss these issues in reverse. As to community standard, appellant contends the only proper

community is the nation. For this he relies upon *Jacobellis v. Ohio* [1964] 378 U.S. 184 [12 L.Ed.2d 793; 84 S.Ct. 1676]. The case does not so hold. Only two judges, Brennan and Goldberg, joined in the opinion requiring a national standard. Two others, Chief Justice Warren and Justice Clark, expressly repudiate the idea of a national standard and Justice Harlan's position that a state has greater latitude in determining what may be banned on the score of obscenity than is so with the Federal government seems meaningless if the standard to be applied is a national one. The other four justices expressed no opinion one way or the other on the question of a national standard.¹ While the Supreme Court of California in *In re Gianini* [1968] 69 Cal.2d 563 [72 Cal.Rptr. 655, 466 P.2d 535], may have left the question open as to books and motion pictures, its holding that the standard is the state has been applied to movies² by the Court of Appeal in *Monica Theater v. Municipal Court*³ [1970] 9 Cal.App. 3d 1 [88 Cal.Rptr. 71] and by this court in *People v. Cimber* [1969] Cr. A.8531.⁴ As we feel that the arguments against a nationwide standard outweigh those in favor, we adhere to our prior ruling. We feel the state-wide standard applies to all forms of alleged obscenity.

¹However, Justice White appears to take a position similar to that of Justice Harlan in the last paragraph of his dissenting opinion in: *A Book v. Attorney General, infra*.

²*Jacobellis v. Ohio* involved a motion picture and the appellant herein apparently concedes that the standard should be the same whether a book or a motion picture is involved.

³See fn. 4, 9 Cal.App. 3d p. 6, and dissenting opinion of Justice Aiso, p. 21.

⁴Hearing by Court of Appeal den. Nov. 4, 1969 and again on Nov. 26, 1969.

Defendant also attacks the standard applied on the ground that the appeal must be to the prurient interest of its proposed audience, to-wit, consenting adults. This contention is answered against his position in *People v. Luros* [1971] 4 Cal.3d 84 [92 Cal.Rptr. 833, 480 P. 2d 633].

Appellant's second point is that the People introduced no evidence to meet his expert's opinion that the book had social importance. The People counter this by claiming that the jury was not required to accept this opinion but could reject the expert's testimony and hence defendant had not met his burden under *People v. Newton* ([1970] 9 Cal.App.3d Supp. 24 [88 Cal.Rptr. 343]). The People misconceive our holding in *Newton*.

All we held in that case was that once the People had presented proof of appeal to prurient interest and overstepping the customary limits of candor, the *burden of going forward* with some evidence on the issue of redeeming social value was on the defendant. The reason for this rule is that where prurient interest is predominant and the customary limits of candor are exceeded, it is difficult to conceive wherein social value might lie. Rather than require the People to start in this void, the defendant must make the start by producing some evidence of social value.⁵ Only then do the Peo-

⁵The Supreme Court appears to have tacitly adopted this position in *In re Giannini* [1968] 69 Cal.2d 563 [72 Cal.Rptr. 655, 446 P.2d 535]. The opinion refers to no evidence of the question of redeeming social value produced by either party in the trial court. In footnote 5 on p. 573 the court says: "Petitioners do not so much as claim that their convictions should be set aside on the ground of the 'redeeming social value' of Iser's dance. Thus we do not reach the problem of whether the dance was 'utterly without redeeming social value. . . .'"

ple know in what area they must proceed. But, as in all cases where only the burden of going forward is placed upon a party once he has done so by producing some evidence, there can be no weighing process until the party having the burden of persuasion has produced something on his own behalf to be weighed. It is then not enough for the party having the burden of persuasion to simply destroy his adversary's evidence for that would only again balance the scales, whereas, the person having the burden of persuasion must tip them. (*People v. Holden* [1972] Cr. A.10754.)

However, while it is true the People introduced no expert evidence on this point, that does not settle the issue. While reversing the state court's holding that "John Cleland's *Memoirs of a Woman of Pleasure*" was obscene, the Supreme Court of the United States said:

"It does not necessarily follow from this reversal that a determination that *Memoirs* is obscene in the constitutional sense would be improper under all circumstances. On the premise, which we have no occasion to assess, that *Memoirs* has the requisite prurient appeal and is patently offensive, but has only a minimum of social value, the circumstances of production, sale, and publicity are relevant in determining whether or not the publication or distribution of the book is constitutionally protected. Evidence that the book was commercially exploited for the sake of prurient appeal, to the exclusion of all other values, might justify the conclusion that the book was utterly without redeeming social importance. It is not that in such a setting the social value test is relaxed so as to dispense with the requirement that a book be utterly devoid of social value, but

rather that, as we elaborate in *Ginzburg v. United States*, 383 U.S. 463, 470-473, 16 L.Ed.2d 31, 37-40, 86 S.Ct. 942, where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, a court could accept his evaluation at its face value."

A Book v. Attorney General [1966] 383 U.S. 413, 420 [16 L.Ed.2d 1, at p. 6, 86 S.Ct. 975].

Is this statement good law in California? Relying upon *People v. Noroff* [1967] 67 Cal.2d 791 [63 Cal. Rptr. 575, 433 P.2d 479], and *People v. Rosakos* [1968] 268 Cal.App.2d 497 [74 Cal.Rptr. 34], appellant contends that it is not. We do not feel these opinions require such a holding. In both of these cases the reviewing court upon its own examination of the alleged obscene material held that as a matter of law applying contemporary community standards, the dominant theme of the material taken as a whole did not appeal to prurient interest. Where the material is so found to lack one of the elements of obscenity as set forth in *Roth v. United States* [1957] 354 U.S. 476 [1 L.Ed.2d 1498, 77 S.Ct. 1304], each court held that this element could not be supplied by pandering. "The seller's statement certainly cannot make that which is not obscene, obscene" (*People v. Rosakos*, p. 500). It is in this light that the court's statement in *Noroff* that "the State Legislature has created no such crime [pandering]" must be viewed [see fn. 3, 67 Cal. 2d p. 793].

But supplying an element missing as a matter of law is one thing. The problem of what type of evidence may be used to prove a required element in a doubt-

ful case is another. Here, there is no contention that the People can prevail without carrying their burden of persuasion on the issue of "no redeeming social value." The jury was adequately instructed on this requirement (plaintiff's instructions 7, 7a and defendant's instructions 23 and 24). We feel that what *A Book* is saying is only that evidence that the book was commercially exploited for the sake of prurient appeal to the exclusion of all other values may be deemed an admission by the defendant that the book is devoid of redeeming social value. Like any other admission by a defendant, it may be received in evidence and may support a finding to the same effect. It is to be remembered that in *In re Giannini* (*supra* fn. 5) the California Supreme Court recognized that there was a distinction between the type of evidence required to prove the elements of "appeal to prurient interest" and "exceeding the customary limits of candor in the community" and that required on the issue of "redeeming social value."⁶ Even if *Noroff* and *Rosakos* are deemed authority for the proposition that pandering can never be used on the question of appeal to prurient interest, that fact does not preclude following *A Book v. Attorney General* on the issue of redeeming social value. The California Legislature by adopting Penal Code § 311(a)(2), which reads as follows:

"In prosecutions under this chapter, where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of

⁶Expert testimony was held necessary to establish the former two elements but not the latter.

the matter and can justify the conclusion that the matter is utterly without redeeming social importance”

simply made it clear that the rule announced by the United States Supreme Court in *A Book* applies in California. As there was, in our opinion, no holding to the contrary in this state, the law is not *ex post facto* as to sales made before its adoption.

In light of the evidence, of the circumstances surrounding the sale (R.T. p. 53, line 27 to p. 55, line 20) and the advertising found following the end of the “story” at p. 180 in the book itself, and remembering the right of the jury to disregard expert opinion if the jurors find it to be unreasonable (Penal Code § 1127[b]), we feel the jury was amply justified in this case in finding that the state had sustained its burden of proving that the material was utterly lacking in social importance. Making our own independent examination of the record as required by *Zeitlin v. Arnebergh* [1963] 59 Cal.2d 901 [31 Cal.Rptr. 800, 383 P.2d 152], we make the same finding.

Relying on cases like *People v. St. Martin* [1970] 1 Cal.3d 524 [83 Cal.Rptr. 166, 463 P.2d 390], appellant contends that as the jury was not instructed on pandering that concept cannot be considered in support of their verdict. *People v. St. Martin* involved a failure to instruct on a possible defense (involving reduction of degree). No such omission is involved herein. As pointed out above, the jury was properly instructed as to the required element of obscenity that the material be utterly without redeeming social value. They were also properly instructed on circumstantial evidence. Beyond this, we know of no requirement

that the trial court must *sua sponte* instruct on what evidence may be considered to prove a particular issue.

We come now to the contention that the book "Suite 69" is not obscene. Part of appellant's argument boils down to a contention that no book can ever be considered obscene. This cannot be true in California, for if it were, cases like *People v. Luros, supra*, and *People v. Chapman* [1971] 17 Cal.App.3d 865 [95 Cal. Rptr. 242] would be meaningless. Hence, a line must be drawn somewhere. Where a sufficient foundation for its introduction has been laid, comparable matter held not obscene by the Supreme Court of the United States or of this state may be helpful in drawing this line; but, unless the comparable material equals or exceeds the subject book on all three elements of obscenity, to-wit: appeal to prurient interest; excess over accepted standards; and lack of evidence of redeeming social importance, such comparable material does not require a finding of non-obscenity as a matter of law. Having examined the subject book in comparison with defendant's chief alleged comparable book "Adam and Eve," we feel there are sufficient distinctions so that even if the latter is not obscene as a matter of law, such fact does not require such a finding as to the subject book.

The jury impliedly found the subject book went beyond the permissible limits. Upon our independent review we agree with the People's experts. "Suite 69" appeals to a prurient interest in sex and is beyond the customary limits of candor within the State of Cali-

fornia. We also find, as did the jury, that there is no redeeming social importance.

Judgment affirmed.

Dated Feb. 7, 1972.

Whyte
Presiding Judge

We concur:

KATZ

Judge

ZACK

Judge

CERTIFICATION FOR PUBLICATION

We certify that the foregoing opinion qualifies for publication in the official reports under California Rules of Court, Rule 976(b) in that it establishes a new rule of law and also involves issues of continuing public interest.

Dated Feb. 7, 1972.

WHYTE
Presiding Judge

KATZ

Judge

ZACK

Judge

APPENDIX B.

Memorandum Opinion and Judgment of the Appellate Department Rendered Prior to Rehearing, and Subsequently Replaced by Opinion and Judgment (Appendix A).

Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

People of the State of California, Plaintiff and Respondent, vs. Murray Kaplan, Defendant and Appellant. Superior Court No. CR. A 10391 Municipal Court of the Los Angeles Judicial District No. 337520.

MEMORANDUM OPINION AND JUDGMENT

Appeal by defendant from judgment of the Municipal Court, David J. Aisenson, Judge.

Judgment affirmed.

For Appellant—Stanley Fleishman, Inc., by David M. Brown.

For Respondent—Roger Arnebergh, City Attorney by Madeleine Flier, Deputy City Attorney.

Appellant states twenty-one grounds for appeal, many of which are overlapping and some (e.g., V, VI, XVIII, XX, and XXI) so vague and general as to be useless in pointing out specific grounds for reversal. In his brief he gets down to three which we may summarize as follows: (1) The book "Suite 69" is not obscene; (2) The prosecution failed to present any evidence that the book is utterly without redeeming social importance, whereas, defendant presented expert testimony that it did have some social importance; (3) That the trial court applied the wrong "community standard."

We will discuss these issues in reverse. As to community standard, appellant contends the only proper community is the nation. For this he relies upon *Jacobellis v. Ohio* [1964] 378 U.S. 184 [12 L.Ed.2d 793; 84 S.Ct. 1676]. The case does not so hold. Only two judges, Brennan and Goldberg, joined in the opinion requiring a national standard. Two others, Chief Justice Warren and Justice Clark, expressly repudiate the idea of a national standard and Justice Harlan's position that a state has greater latitude in determining what may be banned on the score of obscenity than is so with the Federal government seems meaningless if the standard to be applied is a national one. The other four justices expressed no opinion one way or the other on the question of a national standard.¹ While the Supreme Court of California in *In re Giannini* [1968] 69 Cal.2d 563 [72 Cal.Rptr. 655, 466 P.2d 535], may have left the question open as to books and motion pictures, its holding that the standard is the state has been applied to movies² by the Court of Appeal in *Monica Theater v. Municipal Court*³ [1970] 9 Cal. App.3d 1 [88 Cal.Rptr. 71] and by this court in *People v. Cimber* [1969] Cr.A. 8531.⁴ As we feel that the arguments against a nationwide standard outweigh those in favor, we adhere to our prior ruling. We feel the state-wide standard applies to all forms of alleged obscenity.

¹However, Justice White appears to take a position similar to that of Justice Harlan in the last paragraph of his dissenting opinion in: *A Book v. Attorney General*, *infra*.

²*Jacobellis v. Ohio* involved a motion picture and the appellant herein apparently concedes that the standard should be the same whether a book or a motion picture is involved.

³See f.n. 4, 9 Cal.App.3d p. 6, and dissenting opinion of Justice Aiso, p. 21.

⁴Hearing by Court of Appeal den. Nov. 4, 1969 and again on Nov. 26, 1969.

Defendant's second attack on the standard applied, to-wit, that the appeal must be to the prurient interest of its proposed audience, to-wit, consenting adults, is answered against his position in *People v. Luros* [1971] (4 Cal.3d 84; 92 Cal.Rptr. 833) 480 P.2d 633.

Appellant's second point is that the People introduced no evidence to meet his expert's opinion that the book had social importance. While it is true the People introduced no expert evidence on this point, that does not settle the issue. While reversing the state court's holding that "John Cleland's *Memoirs of a Woman of Pleasure*" was obscene, the Supreme Court of the United States said:

"It does not necessarily follow from this reversal that a determination that *Memoirs* is obscene in the constitutional sense would be improper under all circumstances. On the premise, which we have no occasion to assess, that *Memoirs* has the requisite prurient appeal and is patently offensive, but has only a minimum of social value, the circumstances of production, sale, and publicity are relevant in determining whether or not the publication or distribution of the book is constitutionally protected. Evidence that the book was commercially exploited for the sake of prurient appeal, to the exclusion of all other values, might justify the conclusion that the book was utterly without redeeming social importance. It is not that in such a setting the social value test is relaxed so as to dispense with the requirement that a book be utterly devoid of social value, but rather that,

as we elaborate in *Ginzburg v. United States*, 383 U.S. 463, 470-473, 16 L.Ed.2d 31, 37-40, 86 S.Ct. 942, where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, a court could accept his evaluation at its face value."

A Book v. Attorney General [1966] 383 U.S. 413, 420 [16 L.Ed.2d 1, at p. 6, 86 S.Ct. 975].

The California State Legislature has now adopted a similar position in Penal Code §311(a)(2) which reads as follows:

"In prosecutions under this chapter, where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance."

The Legislature has also abolished the requirement of expert testimony (Penal Code §312.1). In light of the evidence of the circumstances surrounding the sale (Reporter's Transcript p. 53, line 27 to p. 55, line 20) and the advertising found following the end of the "story" at p. 180 in the book itself, and remembering the right of the jury to disregard expert opinion if the jurors find it to be unreasonable (Penal Code 1127 (b)), we feel the jury was amply justified in this case in finding that the state had sustained its burden of proving that the material was utterly lacking in social

importance. Making our own independent examination of the record as required by *Zeitlin v. Arnebergh* [1963] 59 Cal.2d 901 [31 Cal.Rptr. 800, 383 P.2d 152, we make the same finding.

We come now to the contention that the book "Suite 69" is not obscene. Part of appellant's argument boils down to a contention that no book can ever be considered obscene. This cannot be true in California, for if it were, cases like *People v. Luros, supra*, and *People v. Chapman* [1971] 17 Cal.App.3d 865 [....Cal.Rptr.] would be meaningless. Hence, a line must be drawn somewhere where a sufficient foundation for its introduction has been laid, comparable matter held not obscene by the Supreme Court of the United States or of this state may be helpful in drawing this line; but, unless the comparable material equals or exceeds the subject book on all three elements of obscenity, to wit: appeal to prurient interest; excess over accepted standards; and lack of evidence of redeeming social importance, such comparable material does require a finding of non-obscenity as a matter of law. Having examined the subject book in comparison with defendant's chief alleged comparable book "Adam and Eve," we feel there are sufficient distinctions so that even if the latter is not obscene as a matter of law, such fact does not require such a finding as to the subject book.

The jury impliedly found the subject book went beyond the permissible limits. Upon our independent review we agree with the People's experts. "Suite 69" appeals to a prurient interest in sex and is beyond

the customary limits of candor within the State of California. We also find, as did the jury, that there is no redeeming social importance.

Judgment affirmed.

Dated Oct. 27, 1971.

WHYTE

Presiding Judge

We concur:

WONG

Judge

SMITH

Judge

APPENDIX C.

**Order of Appellate Department Correcting
Judgment of Court.**

Appellate Department of the Superior Court of the
State of California for the County of Los Angeles.

People of the State of California, Plaintiff and Re-
spondent, vs. Murray Kaplan, Defendant and Appel-
lant. Superior Court No. CR. A. 10391 Municipal
Court of the Los Angeles Judicial District No. 337520.

**ORDER CORRECTING JUDGMENT OF
COURT**

It appearing that by clerical error the judgment of
this court in the above-entitled case, rendered October
27, 1971, omitted the word "not" from line 3, page 5,

IT IS NOW ORDERED that said judgment of this
court be amended nunc pro tunc as of October 27,
1971, so that line 3, page 5 of said judgment shall
read:

"redeeming social importance, such comparable ma-
terial does not require a"

Dated Nov. 3, 1971.

BY THE COURT.

WHYTE

Presiding Judge

WONG

Judge

APPENDIX D.

Order of Appellate Department Granting Petition for Rehearing.

Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

People of the State of California, Plaintiff and Respondent, vs. Murray Kaplan, Defendant and Appellant. Superior Court No. CR. A 10391 Municipal Court of the Los Angeles Judicial District No. 337520.

ORDER GRANTING PETITION FOR REHEARING

Appellant's petition for rehearing having been fully considered, the same is hereby granted. The cause is reset on this court's calendar for December 30, 1971 at 9:30 a.m. for the sole purpose of further considering the question whether Penal Code §311(a)(2) and 312.1 may constitutionally be applied in a case where the offense occurred before the effective date of said statutes and the trial was held after said effective date.

Briefs limited to this sole issue may be filed by the parties as follows:

Appellant's opening brief by November 26, 1971;

Respondent's brief by December 7, 1971;

Appellant's reply brief by December 14, 1971.

Dated: Nov. 10, 1971.

BY THE COURT.

WHYTE

Presiding Judge

WONG

Judge

ZACK

Judge

APPENDIX E.

Order of Appellate Department Certifying Cause to Court of Appeal.

Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

People of the State of California, Plaintiff and Respondent, vs. Murray Kaplan, Defendant and Appellant. Superior Court No. CR A 10391 Municipal Court of the Los Angeles Judicial District No. 337520.

ORDER CERTIFYING CAUSE TO COURT OF APPEAL

Pursuant to Rule 63(a) and (c), California Rules of Court, upon this court's own motion, we certify that the transfer of the above-entitled cause to the Court of Appeal appears necessary to settle important questions of law.

The questions so presented are:

(1) Is the proper community standard in an obscenity prosecution for sale of a book that of the State of California or a national standard?

(2) Is it proper to place the burden of going forward with evidence as to the redeeming social value of matter which meets the tests of appeal to prurient interest and exceeding customary standards on the defendant?

(3) If the answer to the previous question is in the affirmative, what is the burden of the People in meeting defendant's evidence of redeeming social value?

(4) In California may evidence of the circumstances of production, presentation, sale, dissemination

tion, distribution or publicity constitute sufficient evidence of lack of redeeming social value either under the case of *A Book v. Attorney General (Memoirs)* [1966] 383 U.S. 413, 420 [16 L.Ed. 2d 1, 6, 86 S.Ct. 975] or under Penal Code Sec. 311(a)(2)?

(5) May Penal Code Sec. 311(a)(2) be applied in a prosecution for sale or distribution of obscene matter where the sale or distribution occurred before the effective date of such provision?

In our opinion, a copy of which is attached hereto, we answered question (1) that the community was the State of California. Questions (2), (4) and (5) we answered in the affirmative. As to question (3), we held it was not sufficient for the People to merely overcome the defendant's evidence but that they must then produce affirmative evidence of lack of redeeming social value.

Dated Feb. 7, 1972.

BY THE COURT.

WHYTE

Presiding Judge

KATZ

Judge

ZACK

Judge

APPENDIX F.

Order of Court of Appeal Denying Transfer.

**In the Court of Appeal of the State of California,
Second Appellate District, Division Three.**

**People of the State of California, Plaintiff and Respondent, v. Murray Kaplan, Defendant and Appellant.
2d Crim. No. 21346 Sup. Ct. No. CR A 10391. Municipal Court of the Los Angeles Judicial District No. 337520.**

ORDER

The record on transfer in the above entitled cause having been filed in this court on February 8, 1972, pursuant to certification made by the Appellate Department of the Superior Court of Los Angeles County, and this court having considered the matter of whether such cause should be transferred to this court for hearing and decision,

NOW, THEREFORE, IT IS HEREBY ORDERED that such transfer be and it hereby is denied.

Filed: Feb. 17, 1972.

FORD, P. J.

SCHWEITZER, J.

ALLPORT, J.

APPENDIX G.

Order Denying Writ of Habeas Corpus.

In the Supreme Court of the State of California in
Bank. Criminal No. 16214.

In re Kaplan on Habeas Corpus.

Filed: April 12, 1972.

Petition for writ of habeas corpus **DENIED.**

Mosk, J., is of the opinion that the respondent
should be ordered to show cause why the relief prayed
for should not be granted.

[Seal]

I, G. E. BISHEL, Clerk of the Supreme Court of the
State of California, do hereby certify that the preced-
ing is a true copy of an order of this Court, as shown
by the records of my office.

Witness my hand and the seal of the Court this 12th
day of April A.D. 1972.

/s/ By R. C. Matteoli

Deputy Clerk

/s/ Wright

Chief Justice

APPENDIX H.

Constitutional and Statutory Provisions Involved.

1. The pertinent provisions of the First Amendment to the United States Constitution are:

"Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

2. The pertinent provisions of the Fourteenth Amendment to the United States Constitution are:

"No State shall . . . deprive any person of life, liberty, or property, without due process of law, . . ."

3. The pertinent provisions of Article I, Section 10, of the United States Constitution are:

"No State shall . . . pass any . . . ex post facto laws, . . ."

4. California Penal Code §311, at the time of the commission of the alleged offense, provided as follows:

"As used in this chapter:

(a) 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance.

(b) 'Matter' means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction of

any other articles, equipment, machines or materials.

(c) 'Person' means any individual, partnership, firm, association, corporation, or other legal entity.

(d) 'Distribute' means to transfer possession of, whether with or without consideration.

(e) 'Knowingly' means having knowledge that the matter is obscene. (Added Stats. 1961, c.2147, p. 4427, §5)."

5. The pertinent provisions of California Penal Code §311.2, at the time of the commission of the alleged offense, provided as follows:

"(a) Every person who knowingly: sends or causes to be sent, or brings or causes to be brought into this state for sale or distribution, or in this state prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor. * * *

6. California Penal Code §311(a)(2), which became effective after the commission of the alleged offense, provides as follows:

"In prosecutions under this chapter, where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance."

81-1422

FILED

JUN 7 1972

MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. _____

MURRAY KAPLAN,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION
TO GRANTING OF WRIT OF CERTIORARI

ROGER ARNEBERGH
City Attorney

DAVID M. SCHACTER
Chief of the
Appellate Department

WARD G. McCONNELL
Deputy City Attorney

Room 500
205 South Broadway
Los Angeles, Ca. 90012
(213) 485-5483

Attorneys for Respondent

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1971

No. _____

MURRAY KAPLAN,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION
TO GRANTING OF WRIT OF CERTIORARI

ROGER ARNEBERGH
City Attorney

DAVID M. SCHACTER
Chief of the
Appellate Department

WARD G. McCONNELL
Deputy City Attorney

Room 500
205 South Broadway
Los Angeles, Ca. 90012
(213) 485-5483

Attorneys for Respondent

TOPICAL INDEX

	<u>Page</u>
Table of Authorities	ii
STATEMENT OF THE CASE	1
STATEMENT OF THE EVIDENCE	3
I THE BOOK "SUITE 69" IS OBSCENE AND IS NOT PROTECTED UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES	5
II NO SUBSTANTIAL FEDERAL QUESTION EXISTS WITH REGARD TO PETITIONER'S CONTENTION THAT THE EVIDENCE PRESENTED FAILED TO ESTAB- LISH THAT "SUITE 69" IS UTTERLY WITHOUT REDEEMING SOCIAL IMPORTANCE	8
III NO SUBSTANTIAL FEDERAL QUESTION EXISTS WITH REGARD TO PETITIONER'S CONTENTION THAT THE APPELLATE DEPART- MENT "DEvised" A "CONCEPT" OF PANDERING	10
IV CALIFORNIA'S APPLICATION OF STATEWIDE, RATHER THAN NATIONWIDE, CONTEMPORARY, COMMUNITY STANDARDS, IS PROPER	11
V STANLEY v. GEORGIA, 394 U.S. 557 DOES NOT REQUIRE A SHOWING OF SPECIAL CIRCUM- STANCES TO JUSTIFY A PROSECUTION FOR OBSCENITY	13
CONCLUSION	14

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
A Book v. Attorney General 383 U.S. 413	9
In re Giannini 69 Cal.2d 563	12
Ginzburg v. United States 383 U.S. 463	9
Jacobellis v. Ohio 378 U.S. 184	12
People v. Luros 4 Cal.3d 84	14
Roth v. United States (1957) 354 U.S. 476 1 L.Ed.2d 1498	6, 7, 12-14
Stanley v. Georgie 394 U.S. 557	13, 14

<u>Codes</u>	
Penal Code §311	6
Penal Code §311(a) (2)	9, 11
Penal Code §311.2	1
Penal Code §1127(b)	9

<u>Constitutions</u>	
United States Constitution	
First Amendment	5, 6
Fourteenth Amendment	

Rules

Page

California Rules of Court

Rule 24(a) 3

Rule 28(b) 3

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1971

No. _____

MURRAY KAPLAN,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION
TO GRANTING OF WRIT OF CERTIORARI

STATEMENT OF THE CASE

The petitioner, Murray Kaplan, was convicted of a violation of §311.2 of the Penal Code of the State of California, which provides as follows:

"Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, or prints, with intent to distribute or to exhibit to

others, or who offers to distribute, distributes, or exhibits to others, any obscene matter is guilty of a misdemeanor.

"(b) The provisions of this section with respect to the exhibition of, or the possession with intent to exhibit, any obscene matter shall not apply to a motion picture operator or projectionist who is employed by a person licensed by any city or county and who is acting within the scope of his employment, provided that such operator or projectionist has no financial interest in the place wherein he is so employed."

Subsequent to being sentenced petitioner took an appeal to the Appellate Department of the Superior Court of the State of California. The Appellate Department affirmed petitioner's conviction and certified the case to the District Court of Appeal. The District Court of Appeal denied certification and returned the case to the Appellate Department, whereupon petitioner

appeal became final under California law (California Rules of Court, Rules 24(a) and 28(b).)

STATEMENT OF THE EVIDENCE

On May 14, 1969, petitioner sold a book entitled Suite 69 to Los Angeles Police Sergeant Don Shaidell. Shaidell had been a police officer for 16-1/2 years, and had been assigned to the Administrative Vice Division for six years, working exclusively on pornography investigations (R.T. 34-35). Prior, he had worked as a general vice investigator for two years.

On May 14, 1969, Shaidell entered a so-called "adult bookstore" on West Pico Boulevard in the City of Los Angeles at about 11:50 a.m., in response to citizen complaints (R.T. 53).

Petitioner was operating the bookstore at the time, and Shaidell asked him if he had any sexy books (Shaidell was in an undercover capacity and his identity as a police officer was unknown to petitioner). Petitioner showed Shaidell a picture and said, "Look at this. You can see right inside her cunt." (R.T. 54). Petitioner

also told Shaidell all the books in the store were sexy.

Shaidell then asked petitioner if he had any real good paperbacks, to which petitioner replied, "I'm reading a real good book right now. It's called 'Suite 69'." Whereupon petitioner opened the book to pages 84 and 85 and read to Shaidell from the book (R.T. 54-55). Shaidell then purchased the book "Suite 69" and left.

The portion of "Suite 69" read by petitioner to Shaidell to induce the purchase consisted of a statement by one female character to another female, posed in vulgar, gutter language, instructing on and encouraging an act of oral copulation on one by the other, and the physical effect thereof on the copulatee.

Hubert Blackwell, who qualified as an expert witness, testified that the book "Suite 69", taken as a whole predominantly appealed to the prurient interest of the average person in the state of California, applying contemporary standards, and went substantially behind customary limits of candor in the State of California in

description and representation of such matter. Blackwell also explained specifically how the book did so, that it was a purveyor of sex for sex sake (R.T. 142).

Petitioner called as a witness Frank Laven, an attorney specializing in the defense of pornography cases, who testified that in his opinion "Suite 69" neither appealed to prurient interest nor went beyond customary limits of candor in the State of California. He also opined that the book had social value in that a reader could learn about sex, and because it had entertainment value.

I

THE BOOK "SUITE 69" IS OBSCENE
AND IS NOT PROTECTED UNDER THE
FIRST AND FOURTEENTH AMENDMENTS
TO THE CONSTITUTION OF THE
UNITED STATES.

Petitioner contends that the book "Suite 69" is not obscene but rather is entitled to constitutional protection. Respondent submits that a review of the evidence, including a reading of the book in question, clearly demonstrates that the book is obscene and thus is not

constitutionally protected.

Although freedom of expression by means of the written word is guaranteed by the First Amendment, it does not follow that the Constitution requires absolute freedom and the protection of every utterance.

"...[O]bscenity is not within the area of constitutionally protected speech or press." [Roth v. United States (1957), 354 U.S. 476, 1 L.Ed.2d 1498, 1506-7].

The book "Suite 69" does nothing more than depict a number of unrelated scenes dealing with sex in a shocking, morbid and shameful manner. Taken as a whole, the book goes substantially beyond customary limits of candor in description of such matters and is utterly without redeeming social importance. [Penal Code §311; Roth v. United States, supra].

The erotic scenes, which comprise the entire book, recur with increasing intensity and without direction toward any theme or plot. Any attempt at character development, is clearly not discernible. The various and frequent sexual acts are graphically depicted and emphatically described. They

include repeated acts of masturbation, oral copulation, voyeurism, lesbianism, homosexuality, sadism and sodomy without any clear reference to a dominant theme. If these acts are omitted from the book, the reader would be left with 180 blank pages. The book is clearly not a clinical, psychological or scientific study of young couples on their honeymoon and the sexual problems that may occur. Respondent respectfully submits that the book "Suite 69" is nothing more than hard core pornography.

Part of petitioner's contention that the book is not obscene boils down to a contention that no book can ever be considered obscene. If this were true, all of the litigation, all of the many opinions rendered by this court, would be meaningless. Although "sex and obscenity are not synonymous", Roth v. United States, 554 U.S. at 487, merely because "Suite 69" deals solely with sex does not mean that it is not obscene. Rather, as was shown by independent review of two municipal court judges, by the jury's verdict based on expert testimony, and by review by the three judges of the Appellate Department of the Superior

Court of the State of California, "Suite 69" is clearly and inescapably nothing more than hard core pornography.

II

NO SUBSTANTIAL FEDERAL QUESTION EXISTS WITH REGARD TO PETITIONER'S CONTENTION THAT THE EVIDENCE PRESENTED FAILED TO ESTABLISH THAT "SUITE 69" IS UTTERLY WITHOUT REDEEMING SOCIAL IMPORTANCE.

Petitioner's contention that the "record is barren of any evidence to establish that the book herein is utterly without redeeming social importance" is incorrect and raises no substantial federal question. The Appellate Department of the Superior Court of the State of California correctly pointed out that competent and sufficient evidence was presented to justify the jury's and the court's conclusion that the book was utterly without redeeming social importance. In California, where circumstances of production, presentation, sale, dissemination, distribution or publicity indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with

respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance.

The above rule, codified in California Penal Code §311(a)(2) [Definitions] subsequent to the date of petitioner's violation but prior to his trial, is plainly a rule of evidence as to one way of proving that matter is utterly without redeeming social importance. It is based on this Court's holdings in Ginzburg v. United States, 383 U.S. 463, 470-473, and A Book v. Attorney General, 383 U.S. 413, 420.

The Appellate Department of the Superior Court of the State of California correctly pointed out that the rule announced by this Court was effective in California from its announcement in 1966, and its subsequent codification in California did nothing more than make this clear; and made it clear also that, in California, it was merely a rule of evidence and could not support some separate type of charge such as pandering.

Petitioner's contention that the only evidence on social value came from a defense witness completely ignores California Penal Code §1127(b), which allows jurors to give

no weight at all to expert testimony if they find it is entitled to none. While respondent recognizes that such will not supply a missing element, when considered together with other competent evidence that the matter is without social value, the utter failure of a defendant attempting to prove social value to do so strengthens the evidence that the matter is utterly without redeeming social importance.

Respondent submits that petitioner has raised no substantial federal question in that the situation involves nothing more than long-standing state rules of evidence.

III

NO SUBSTANTIAL FEDERAL QUESTION
EXISTS WITH REGARD TO PETITIONER'S
CONTENTION THAT THE APPELLATE
DEPARTMENT "DEvised" A "CONCEPT"
OF PANDERING.

Petitioner contends there is no basis in fact to sustain a finding that he engaged in pandering. Respondent submits that whether or not certain evidence was presented, and the inferences implicitly drawn therefrom by the jury, hardly present any federal question.

To say that petitioner was "convicted of pandering" is a gross misstatement of the situation. All the Appellate Department of the Superior Court did was apply existing law, announced by this court in 1966, in determining the sufficiency of the evidence. The Appellate Department did not even apply Penal Code §311(a)(2) in petitioner's case, it merely applied the law of the land and of California as it had existed since 1966, and pointed out that the statute, which was enacted subsequent to petitioner's violation and prior to his trial, was not ex post facto, since it was a codification of existing law.

Petitioner's statements, his reading of a selected portion of the book, to induce the officer to purchase the book, speak for themselves.

IV

CALIFORNIA'S APPLICATION OF
STATEWIDE, RATHER THAN NATION-
WIDE, CONTEMPORARY COMMUNITY
STANDARDS, IS PROPER.

This court has defined obscenity in terms of the average person applying

contemporary community standards. Roth v. United States, 354 U.S. 476. The California Supreme Court has held that the relevant "community" is the entire State of California, and that proof of the standard must be made by the prosecution by expert testimony. In re Giannini, 69 Cal.2d 563, 578. This has resulted in various law enforcement agencies throughout the state conducting "Gallup Poll" type surveys of the entire state; in Los Angeles the surveys are conducted on the average of every six months.

Petitioner contends that Jacobellis v. Ohio, 378 U.S. 184 requires employment of a nationwide standard. This is not so. Four of the justices expressed no opinion on the question of a national standard, two felt a national standard should apply and two disagreed, and one seemingly disagreed.

Respondent submits the arguments against a nationwide standard far outweigh those in favor. For example, it would be a practical impossibility for a prosecutor or law enforcement agency in a small town in California to conduct a survey of the entire nation, which, in the end, very likely would

establish standards much stricter than those existing in the State of California.

Respondent submits that the entire state of California is a large enough "community".

It is possible to unreasonably construe this court's holding in Roth v. United States, 354 U.S. 476, in such a way that nothing could possibly be found obscene. It is one thing to say the matter must be utterly without redeeming social importance, and quite another to say the prosecution has the initial burden of proving beyond a reasonable doubt that the matter has no social value whatsoever; such a construction requires the prosecution to prove a negative out of a void, while the defendant, who claims to be "expressing" and "communicating", need put on no evidence as to what area of human culture is encompassed by his "idea".

V

STANLEY V. GEORGIA, 394 U.S. 557
DOES NOT REQUIRE A SHOWING OF
SPECIAL CIRCUMSTANCES TO JUSTIFY
A PROSECUTION FOR OBSCENITY.

Contrary to his previous argument about "pandering", petitioner feels a concept

should be devised based on his theory of Stanley v. Georgia, 394 U.S. 557, which is that if it is permissible to possess hard core pornography in one's home, it is permissible to sell it, because one must necessarily obtain it before possessing it. This contention was answered by the California Supreme Court in People v. Luros, 4 Cal.3d 84, which called petitioner's theory "highly concatenated". The theory is at best highly unrealistic, and the answer to it is contained in Stanley v. Georgia, 394 U.S. 557, which expressly stated that Roth v. United States, 354 U.S. 476 was still the law.

CONCLUSION

The Petition for Writ of Certiorari does not disclose a clear and convincing showing that there has been a violation of petitioner's rights under the Federal Constitution, or that a state court has decided a federal question of substance not heretofore determined by this court.

There appears no reason why the
petition should not be heard or granted.

Respectfully submitted

ROGER ARNEBERGH
City Attorney

DAVID M. SCHACTER
Chief of the
Appellate Department

WARD G. McCONNELL
Deputy City Attorney
Attorneys for Respondent

ORIGINAL

FILED

IN THE

Supreme Court of the United States

AUG 29 1972

MICHAEL RODAK, JR., CLERK

October Term, 1971

No. 71-1422

MURRAY KAPLAN,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

BRIEF FOR PETITIONER.

STANLEY FLEISHMAN,

DAVID M. BROWN,

Suite 718 Max Factor Building,
6922 Hollywood Boulevard,
Hollywood, Calif. 90028,

Counsel for Petitioner.

SAM ROSENWEIN,

Of Counsel.

SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	3
Constitutional and Statutory Provisions Involved ..	5
Statement	5
Summary of Argument	14

I.

<p>California Penal Code §§311 and 311.2, as Construed and Applied to Authorize the Judgment of Conviction of Petitioner Herein, Where the Sole Evidence in the Record Establishes That Petitioner, a Retail Bookseller, Sold the Book to an Adult Who Requested the Book and Purchased It, Ostensibly for His Personal Use, and Where the Prosecution Stipulated That Petitioner Neither Sold the Material in His Bookstore to Minors nor Thrust It Upon the General Public, Deprive Petitioner of His Liberty and Property Without Due Process of Law and Abridge Petitioner's Exercise of Freedoms of Speech and Press, Contrary to the Free Speech and Press and Due Process Provisions of the First and Fourteenth Amendments</p>	18
---	----

II.

<p>The Sale of a Sexually Explicit Book to a Consenting Adult When Surrounded by Notice to the Public of Its Nature and by Reasonable Protection Against Exposure to Juveniles, Does Not Patently Offend Contemporary Standards, Does Not Appeal to Prurient Interest and Has Social Value</p>	26
--	----

The Book "Suite 69" Is Expression Protected by the Free Speech and Press and Due Process Provisions of the First and Fourteenth Amendments. California Penal Code §§311 and 311.2, as Construed and Applied to Punish the Sale of Said Book by a Retail Bookseller to an Adult Who Requested and Purchased the Book, Render the State Obscenity Statutes Unconstitutional, Arbitrarily Deprive This Petitioner of His Liberty and Property Without Due Process of Law, and Abridge the Exercise by Petitioner of Freedoms of Speech and Press, All Contrary to the Free Speech and Due Process Provisions of the First and Fourteenth Amendments

56

IV.

California Penal Code §§311 and 311.2, as Construed and Applied to Authorize the Judgment of Conviction Herein Without Any Evidence in the Record in Support of an Essential Element of the Offense, to Wit, That the Book Was Utterly Without Redeeming Social Importance, and Where the Only Uncontroverted Evidence Offered by Petitioner Established by Expert Testimony That the Book Had Social Importance, Deprive Petitioner of His Liberty and Property Without Due Process of Law and Abridge Petitioner's Exercise of Freedoms of Speech and Press, Contrary to the Free Speech and Press and Due Process Provisions of the First and Fourteenth Amendments

59

California Penal Code §§311 and 311.2, as Construed and Applied to Authorize the Judgment of Conviction of Petitioner Herein Upon the Theory That Proof of "Pandering" May Serve as a Substitute for Proof by the Prosecution That the Book Is Utterly Without Redeeming Social Importance, Where No Charge of "Pandering" Was Ever Made in the Complaint nor Ever Proved, Where the Case Was Never Tried Upon Such a Theory and the Jury Was Never Instructed Upon Such an Issue, Where the Prosecution Itself Conceded That the Doctrine of "Pandering" Could Not Be Invoked to Affirm the Conviction, and Where State Statutes Which Became Effective Long After the Commission of the Alleged Offense Were Retroactively Applied to Punish the Alleged Conduct of "Pandering," When Such Conduct Was Not Punishable Under the Laws of the State at the Time of the Commission of the Alleged Offense, and the Highest Court of the State Had Ruled That Evidence of Such Conduct Could Not Be Used to Support a Conviction Under the General Obscenity Statute, Arbitrarily and Capriciously Deprive Petitioner of His Liberty and Property Without Due Process of Law, Deny Petitioner the Equal Protection of the Laws, and Abridge Petitioner's Exercise of Freedoms of Speech and Press, Contrary to the Free Speech and Press, Due Process, and Equal Protection Provisions of the First and Fourteenth Amendments 66

California Penal Code §§311 and 311.2, as Construed and Applied to Authorize the Judgment of Conviction Herein, Where the Standard for Judging the Alleged Obscenity of the Book Was Based Upon the Community Standards of the State, and Not Upon the Standards of the Nation as a Whole, Deprive Petitioner of His Liberty and Property Without Due Process of Law and Abridge Petitioner's Exercise of Freedoms of Speech and Press, Contrary to the Free Speech and Press and Due Process Provisions of the First and Fourteenth Amendments	75
Conclusion	79

TABLE OF AUTHORITIES CITED

Cases	Page
A Book v. Attorney General (Memoirs) (1966) 383 U.S. 413, 16 L. Ed. 2d 1, 86 S. Ct. 975	14
Aday v. United States, 388 U.S. 447, rev. sub. nom. United States v. West Coast News Co., 357 F. 2d 855 (6 Cir. 1966)	36, 57, 73
I. M. Amusement Corp. v. Ohio, 389 U.S. 573 ..	36
Austin v. Kentucky, 386 U.S. 767	36
Avansino v. New York, 388 U.S. 446	36, 58
Beauharnais v. Illinois, 343 U.S. 250	20
Benton v. Maryland, 395 U.S. 784	78
Bloss v. Dykema, 398 U.S. 278	36, 73, 74
Bloss v. Michigan, 402 U.S. 938	36
Books, Inc. v. United States, 388 U.S. 449, rev. 358 F. 2d 935 (1 Cir. 1966)	36, 57, 73
Bowie v. City of Columbia, 378 U.S. 347	72
Burgin v. South Carolina, 92 S. Ct. 46	36
Butler v. Michigan, 352 U.S. 380	28
Cain v. Kentucky, 397 U.S. 319	36
California v. Pinkus, 400 U.S. 922	36
Carlos v. New York, 396 U.S. 119	36
Central Magazine Sales, Ltd. v. United States, 389 U.S. 50	36, 73
Chance v. California, 389 U.S. 89	36
Chaplinsky v. New Hampshire, 315 U.S. 568	20
Childs v. Oregon, 401 U.S. 1006	36, 57, 73
Cobert v. New York, 388 U.S. 443	36
Cole v. Arkansas, 333 U.S. 196	68

	Page
Connor v. City of Hammond, 389 U.S. 48	36
Corinth Publications, Inc. v. Wesberry, 388 U.S. 448	36, 57, 58
DeJonge v. Oregon, 299 U.S. 353	68
Eisenstadt v. Baird, 405 U.S. 438, 92 S. Ct. 1029	25, 55
Felton v. Pensacola, 390 U.S. 340	36
Freedman v. Maryland, 380 U.S. 51	76
Friedman v. New York, 388 U.S. 441	36, 58
Furman v. Georgia, 405 U.S. 2726	38
Garner v. Louisiana, 368 U.S. 157	65, 68
Garrity v. New Jersey, 385 U.S. 493	78
Gent v. Arkansas, 386 U.S. 767	36
Giannini, In re, 69 Cal. 2d 563, 446 P. 2d 535, 72 Cal. Rptr. 655 (1968)	50
Gideon v. Wainwright, 372 U.S. 335	78
Ginzburg v. United States, 383 U.S. 46313, 2429, 30, 33, 39, 44, 68, 70, 74	
Gitlow v. New York, 268 U.S. 652	78
Glancy v. County of Sacramento, 17 Cal. App. 3d 504, 94 Cal. Rptr. 864 (1971).....	51, 52
Gooding v. Wilson, 405 U.S. 518	20
Grant v. United States, 380 F. 2d 748 (9 Cir. 1967)	58
Griswold v. Connecticut, 381 U.S. 479	35, 26, 55
Grove Press, Inc. v. Christenberry, 276 F.2d 433 (2 Cir. 1960), affg. 175 F. Supp. 488 (D.C. N.Y. 1959)	* 36, 58
Grove Press, Inc. v. Gerstein, 378 U.S. 577	36, 58

Haldeman v. United States, 340 F. 2d 59 (10 Cir. 1965)	58
Hartstein v. Missouri, 92 S. Ct. 531	36
Hayse v. Van Hoomissen, 321 F. Supp. 642 (Ore. 1970), vac. 403 U.S. 927	33
Henry v. Louisiana, 392 U.S. 655	36
Hoyt v. Minnesota, 399 U.S. 524	8, 36, 57
Jacobellis v. Ohio, 378 U.S. 184	9, 27, 28
.....36, 42, 62, 75, 76, 77, 78	
Keney v. New York, 388 U.S. 440	36, 58
Keralexis v. Byrne, 306 F. Supp. 1363 (Mass. 1969), vac. 401 U.S. 216	33, 46
Kingsley Int'l Pic. Corp. v. Regents, 360 U.S. 684	21, 28, 36
Kois v. Wisconsin, 92 S. Ct. 2245	36
Landau v. Fording, 245 Cal. App. 2d 820, 54 Cal. Rptr. 177 (1966)	71, 72
Leary v. United States, 395 U.S. 6	61
Luros v. United States, 389 F. 2d 200 (8 Cir. 1968)	58, 73
Malloy v. Hogan, 378 U.S. 1	78
Manual Enterprises, Inc. v. Day, 370 U.S. 478	36, 37
Marcus v. Search Warrants of Property, 367 U.S. 717	19, 20, 76
Mazes v. Ohio, 388 U.S. 453	36, 58
Memoirs v. Massachusetts, 383 U.S. 413	13, 36
.....58, 59, 60, 62, 67, 70	
Miller v. California, No. 70-73	79
Mishkin v. New York, 383 U.S. 502	29

	Page
NAACP v. Alabama, 357 U.S. 449	20
New York Times Co. v. Sullivan, 376 U.S. 254	20 36
One, Inc. v. Olsen, 355 U.S. 371	36, 37
Pennekamp v. Florida, 328 U.S. 331	78
People v. Holden, App. Dept. S. Ct. Co. of L.A., State of Calif., No. CR A 10754, unrep. (1972)	64, 67
People v. Newton, 9 Cal. App. 3d Supp. 24, 88 Cal. Rptr. 343	67
People v. Noroff, 67 Cal. 2d 791, 433 P.2d 479, 63 Cal. Rptr. 575	11, 70, 71, 72
Potomac News Co. v. United States, 389 U.S. 47	36, 73
Quantity of Copies of Books v. Kansas, 378 U.S. 205	19, 20, 57
Quantity of Copies of Books v. Kansas, 388 U.S. 452	36
Rabe v. Washington, 405 U.S. 13, 92 S. Ct. 993	18, 27, 67, 68, 69
Ratner v. California, 388 U.S. 442	36
Redrup v. New York, 386 U.S. 767	16, 30, 36 56, 58, 73
Robert-Arthur Management Corp. v. Tennessee, 389 U.S. 578	36
Robinson v. California, 370 U.S. 660	37
Rosenbloom v. Virginia, 388 U.S. 450	36
Roth v. United States, 354 U.S. 476	15, 18, 19 21, 23, 26, 27, 28, 29, 32 33, 36, 37, 42, 57, 59, 61, 76, 77
Rowan v. U.S. Post Office Dept., 397 U.S. 728 ..	32

	Page
Russell v. United States, 369 U.S. 749	54, 55
Shackman v. California, 388 U.S. 454	36
Sheperd v. New York, 388 U.S. 444	36, 58
Smith v. California, 361 U.S. 147 ..3, 19, 20, 39, 76	
Speiser v. Randall, 357 U.S. 513	59
Spinar and Germain v. United States, 440 F. 2d 1241 (8 Cir. 1971)	73
Stanley v. Georgia, 394 U.S. 55714, 15, 20, 2122, 23, 24, 25, 27, 32, 33, 34, 35, 46	
Stein v. Batchelor, 300 F. Supp. 602 (Texas 1969), vac. Dyson v. Stein, 400 U.S. 200	33
Sunshine Book Co. v. Summerfield, 355 U.S. 372	36, 37
Thompson v. City of Louisville, 362 U.S. 199	65
Thompson v. Utah, 170 U.S. 343	72
Times Film Corp. v. Chicago, 365 U.S. 43	36
Tot v. United States, 319 U.S. 463	61
Tralins v. Gerstein, 378 U.S. 576	36, 58
United States v. Baranov, 418 F. 2d 1051 (9 Cir. 1969)	73
United States v. Dellapia, 433 F. 2d 1252 (2 Cir. 1970)	25, 33, 35, 46
United States v. Lethe, 312 F. Supp. 421 (E.D. Cal. 1970)	33
United States v. Motion Picture Entitled "Language of Love", 432 F. 2d 705 (2 Cir. 1970)	43
United States v. National Dairy Products Corp., 372 U.S. 29	54, 55
United States v. Orito, U.S.D.C. E.D. Wis. No. 70-CR-20, pend. re-argu. No. 70-69	33

United States v. Reidel, U.S.D.C. Cal. No. 5845-HP, reversed 402 U.S. 351	23, 27, 33, 35, 46, 54
United States v. Stewart, 336 F. Supp. 299 (D.C. Pa. 1971)	43
United States v. 31 Photographs, etc., 156 F. Supp. 350 (D.C. N.Y. 1957)	47, 49
United States v. Thirty-Seven (37) Photographs, 309 F. Supp. 36 (Cal. 1970)	27, 33, 35, 54
United States v. Various Articles of "Obscene" Merchandise, 315 F. Supp. 191 (S.D. N.Y. 1970)	33, 35
United States v. Vuitch, 402 U.S. 62	53, 55, 61
Virginia Ry. Co. v. Mullins, 271 U.S. 220	3
Walker v. Ohio, 398 U.S. 434	36, 57, 73
Weems v. United States, 217 U.S. 349	37
Weiner v. California, 92 S. Ct. 534	36
Winship, In re, 397 U.S. 358	59

Miscellaneous

Commission's Report, pp. 7-44	40
Commission's Report, pp. 23-27, 139-243	45
Commission's Report, pp. 47-69	40
Commission's Report, pp. 51-56	45
Commission's Report, pp. 73-369	40
Commission's Report, pp. 113-117	43
Commission's Report, pp. 150-154	41
Commission's Report, pp. 157-160, 356-357	44
Commission's Report, p. 352	45
Commission's Report, pp. 355, 356	45
Commission's Report, pp. 642-646	41

The Report of the Commission on Obscenity and Pornography, September, 1970, United States Government Printing Office, p. 52	22, 63
---	--------

The Report of the Commission on Obscenity and Pornography, U.S. Government Printing Office, September 1970, pp. 634-639	39
---	----

Rules

California Rules of Court, Rule 24(a)	3
California Rules of Court, Rule 28(b)	3, 19, 20
.....	39, 76
California Rules of Court, Rule 62	3
California Rules of Court, Rule 63	11
California Rules of Court, Rule 63(a)	2, 13
California Rules of Court, Rule 63(3)	2, 13

Statutes

California Penal Code, Sec. 311	3, 4, 5, 18, 56
.....	59, 66, 75
California Penal Code, Sec. 311(a)	67
California Penal Code, Sec. 311(a)(2)	5, 9, 11
.....	14, 69, 70
California Penal Code, Sec. 311.2	3, 4, 5, 18, 56
.....	59, 66, 67, 75
California Penal Code, Sec. 312.1	10, 11
California Penal Code, Sec. 1471	2, 3
Public Law 90-100	38
United States Code, Title 19, Sec. 305	35
United States Code, Title 28, Sec. 1257(3)	3
United States Code Annotated, Title 19, Sec. 1305	47

	Page
United States Constitution, Art. I, Sec. 10	5
United States Constitution, First Amendment	3, 4, 5
.....8, 9, 14, 15, 18, 19, 20, 25, 26, 32, 33, 35	
.....43, 50, 52, 55, 56, 58, 59, 65, 66, 75, 76, 77	
United States Constitution, Fourth Amendment	20
United States Constitution, Fifth Amendment	53
United States Constitution, Fourteenth Amendment	
.....3, 4, 5, 8, 9, 14, 18, 53	
.....56, 58, 59, 65, 66, 75, 78	

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1422

MURRAY KAPLAN,

Petitioner,

vs.,

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

BRIEF FOR PETITIONER.

Opinions Below.

The opinion of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles is reported in 23 Cal. App. 3d Supp. 9, 100 Cal. Rptr. 372, and is printed in Appendix A to the Petition for Certiorari. The memorandum opinion and judgment of the said Appellate Department, rendered prior to rehearing and subsequently replaced by the aforesaid opinion and judgment appearing in Appendix A to the Petition for Certiorari, was rendered on October 27, 1971. The said opinion is not reported and appears in Appendix B to the Petition for Writ of Certiorari.

Jurisdiction.

The judgment of the Appellate Department of the Superior Court of the State of California for the

County of Los Angeles (App. Pet. A)* was entered on February 7, 1972.

The initial judgment of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles (App. Pet. B) was entered on October 27, 1971, and the order correcting the said judgment (App. Pet. C) was entered on November 3, 1971. Upon the filing of a due and timely petition for rehearing, an order was made by the said Appellate Department granting the petition for rehearing. The said order was entered on November 10, 1971, and appears as Appendix D to the Petition for Certiorari.

Upon rehearing, the Appellate Department rendered its aforesaid judgment, entered on February 7, 1972 (App. Pet. A). On the same date the Appellate Department entered its order certifying the cause to the Court of Appeal pursuant to Rule 63(a) and (3), California Rules of Court. A copy of the said order certifying the cause to the Court of Appeal appears as Appendix E to the Petition for Certiorari. On February 17, 1972, the Court of Appeal of the State of California, Second Appellate District, Division Three, made its order denying transfer of the cause. A copy of the said order appears as Appendix F to the Petition for Certiorari.

By the aforesaid denial of transfer by the Court of Appeal the Appellate Department of the Superior Court of the State of California for the County of Los Angeles became the highest court of the State in which a decision could be had.¹ See, California Penal Code

*The reference "App. Pet." refers to the Appendices to the Petition for a Writ of Certiorari herein and are not reprinted here.

¹A petition for a writ of habeas corpus was subsequently filed in the Supreme Court of the State of California and denied by

§1471; California Rules of Court, Rule 62. See also, California Rules of Court, Rules 24(a) and 28(b); *Smith v. California*, 361 U.S. 147, 148, fn. 2; *Virginia Ry. Co. v. Mullins*, 271 U.S. 220, 222.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

Questions Presented.

1. Whether California Penal Code §§311 and 311.2, as construed and applied, deprive petitioner of his liberty and property without due process of law and his exercise of freedoms of speech and press, contrary to the provisions of the First and Fourteenth Amendments, because the sole evidence upon which his conviction rests establishes that petitioner sold a book to an adult who requested it and where the prosecution stipulated that petitioner neither sold material dealing with sex to minors nor thrust such material upon an unwilling public.

2. Whether a sexually explicit book, when sold to a consenting adult, surrounded by notice to the public of its nature and with reasonable protection from exposure to juveniles, is patently offensive, appeals to prurient interest, and is utterly without redeeming social value.

3. Whether California Penal Code §§311 and 311.2, as construed and applied, deprive petitioner of his liberty and property without due process of law and abridge the exercise by petitioner of freedoms of

that Court without opinion on April 12, 1972, Judge Mosk being of the opinion that the Respondent should be ordered to show cause why the relief prayed for in the petition should not be granted. A copy of the order denying the petition for writ of habeas corpus appears as Appendix G to the Petition for Certiorari.

speech and press, contrary to the provisions of the First and Fourteenth Amendments, because petitioner was convicted of selling a book to a consenting adult, which book is legally indistinguishable from books found to be not obscene by this Court.

4. Whether California Penal Code §§311 and 311.2, as construed and applied, deprive petitioner of his liberty and property without due process of law and abridge his exercise of freedoms of speech and press, contrary to the provisions of the First and Fourteenth Amendments, because petitioner was convicted without any evidence in the record that the charged book was utterly without redeeming social importance and where the only uncontroverted evidence established that the book had social value.

5. Whether Penal Code §§311 and 311.2, as construed and applied, deprive petitioner of his liberty and property without due process of law and the equal protection of the laws and abridge his exercise of freedoms of speech and press, contrary to the provisions of the First and Fourteenth Amendments:

(a) because he was convicted under a "pandering" theory although neither the statute nor the accusatory pleading fairly informed him that he was charged with pandering in connection with his sale of the book and where there was no evidence of pandering and the jury was never instructed upon that issue; and

(b) where the state pandering statute which became effective long after petitioner sold the book was retroactively applied to punish petitioner's alleged conduct of "pandering" when such conduct was not punishable under the laws of the State at the time of the sale of the book and the highest court of the State had ruled

that evidence of such conduct could not be used to support a conviction under California's general obscenity statute.

6. Whether California Penal Code Code §§311 and 311.2, as construed and applied, deprive petitioner of his liberty and property without due process of law and abridge his exercise of freedoms of speech and press, contrary to the provisions of the First and Fourteenth Amendments, because the standard for judging the alleged obscenity of the book petitioner sold was based upon the community standards of the State of California and not the standards of the Nation as a whole.

Constitutional and Statutory Provisions Involved.

The pertinent provisions of the First and Fourteenth Amendments and Article I, §10, of the Constitution of the United States and the provisions of California Penal Code §§311 and 311.2 at the time of the commission of the alleged offense, and the provisions of California Penal Code §311(a)(2), which became effective after the commission of the alleged offense, appear in Appendix A hereto.

Statement.

On June 3, 1969, a three-count Complaint was filed against Petitioner in the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California, charging violations of California Penal Code §311.2, the state obscenity statute [A. 7-8]. The trial under the said Complaint commenced on January 12, 1971, in the said Municipal Court before the Honorable David J. Aisenson, a Judge of the said Court, and a jury. On February 4, 1971, the jury returned verdicts of acquittal as to two of the counts

and returned a verdict of guilty solely with respect to the sale by petitioner of a paperback book entitled "Suite 69" to a police officer who had requested it [A. 54-56].

Prior to trial, petitioner moved to dismiss the Complaint on the basis that sale of sexually oriented material to consenting adults only is constitutionally permissible [A. 10]. In connection with the motion, the prosecution stipulated that [it did not claim that] petitioner neither disseminated any material to minors nor thrust it upon the general public [A. 14]. The Court denied the motion [A. 14-15]. Petitioner also moved the Court prior to trial to dismiss Count 3 of the Complaint on the basis that the book there charged, "Suite 69," is constitutionally protected as a matter of law [A. 15-17]. This motion also was denied [A. 32].

At the trial it was established that petitioner is the owner of a bookstore located in the City of Los Angeles, County of Los Angeles, State of California. A police officer testified that he purchased the book from petitioner who was then working as a clerk in his bookstore [A. 37-58]. The officer stated that he had asked petitioner whether he had any good sexy books, and that petitioner had replied that all his books were sexy [A. 54]. The police officer subsequently asked if petitioner had any real good paperback books, and petitioner replied that he was "reading one right now, and it's called 'Suite 69'" [A. 54-55]. Petitioner then read a portion of the book to the officer [A. 55]. On cross-examination, the police officer stated that there are about 250 "adult bookstores" in the City of Los Angeles [A. 59].

Aside from the testimony of the aforesaid police officer, the only other testimony offered by the prosecution was by another vice officer who testified over objection [A. 114-115, 115-116, 121], that the material in question appealed to a prurient interest in sex and exceeded customary limits of candor, based upon the contemporary community standards of the State of California [A. 128]. The officer's testimony was based upon a public opinion survey taken by the officer in which he identified himself as a police officer to the persons questioned [A. 93-94]. The vice officer also stated that he had personally made about 300 arrests for alleged violations of the state obscenity laws [A. 180-181]. The prosecution offered no testimony that the book was utterly without redeeming social importance. A motion for judgment of acquittal at the end of the prosecution's case was denied as was a motion to strike the opinion testimony of the vice officer [A. 219-226].

On behalf of petitioner, Franklin Laven, an attorney [A. 257], testified that the book "Suite 69" does not exceed customary limits of candor, does not appeal to a prurient interest in sex, and has social importance [A. 292, 302-304]. The witness Laven had been retained by the Commission on Obscenity and Pornography to make a survey concerning the distribution of sexually oriented material throughout the United States [A. 258-259], and the witness was familiar with other research conducted by the Commission [A. 283-286]. The Report of the Commission (Govt. Printing Office, September, 1970) was offered by petitioner [A. 174], but was not admitted into evidence [A. 177]. The Court did receive in evidence by way of judicial notice a book entitled "Adam and Eve," found to be

constitutionally protected by the Court in *Hoyt v. Minnesota*, 399 U.S. 524 [A. 173-174, 338-339].

At the close of all the evidence, petitioner again moved for judgment of acquittal, which again was denied [A. 429-433]. Following the return of the verdicts [A. 479-480] and the denial of petitioner's motion for a new trial, [A. 6] Petitioner was granted probation for a period of three years, on condition that he spend 30 days in the county jail and pay a fine of \$1,000.00.

A due and timely appeal was prosecuted by petitioner to the Appellate Department of the Superior Court of the State of California for the County of Los Angeles. The questions presented on appeal included the following: (1) That the book "Suite 69" is not obscene and that the state obscenity statute, as construed and applied, violated the free speech and press, due process, and equal protection provisions of the First and Fourteenth Amendments and the interpretive decisions of the Court and the rulings of other federal and state courts holding comparable books to be entitled to constitutional protection; (2) That the prosecution had failed to present any evidence in support of an essential element of the offense, to wit, that the book was utterly without redeeming social importance, and that the statute, as construed and applied to authorize the judgment of conviction upon an uncontroverted record showing that the book was not utterly without redeeming social importance, violated the free speech and press, due process, and equal protection provisions of the First and Fourteenth Amendments; (3) That the statute, as construed and applied to authorize the judgment of conviction based upon a state community standard, and not upon a national

standard, violated the free speech and press, due process, and equal protection provisions of the First and Fourteenth Amendments; and, (4) That the statute, as construed and applied to authorize the judgment of conviction without any evidence to establish that the book appealed to the prurient interest of the actual or intended audience, or went substantially beyond contemporary limits of candor measured by community standards in the Nation as a whole, violated the free speech and press, due process, and equal protection provisions of the First and Fourteenth Amendments.

On October 27, 1971, the Appellate Department of the Superior Court of the State of California for the County of Los Angeles filed a memorandum opinion and judgment, affirming the conviction (App. Pet. B). With respect to the issue as to the appropriate community standard, the Court declined to follow the ruling of the Court in *Jacobellis v. Ohio*, 378 U.S. 184. The Court held that "the arguments against a nation-wide standard outweigh those in favor" and that "the state-wide standard applied to all forms of alleged obscenity" (App. Pet. B, p. 11).

With respect to the issue of the failure of the prosecution to adduce any evidence that the book was utterly without social importance, and the fact that petitioner had presented uncontroverted expert evidence that the book had social importance, the Appellate Department asserted that the failure of proof was not fatal. The reasoning of the Court was that California had enacted new legislation, California Penal Code §311(a)(2), effective November 10, 1969, some six months after the commission of the alleged offense herein, which provided that in obscenity prosecutions, where the circumstances of production, purchase, sale,

dissemination, distribution or publicity indicated that matter was "being commercially exploited by the defendant for the sake of its prurient appeal," such evidence was probative with respect to the nature of the matter and could "justify the conclusion that the matter is utterly without redeeming social importance." Based upon such statute and upon another recent statute, California Penal Code §312.1, which abolished the requirement of expert testimony, the Appellate Department concluded that the conversation between the police officer and petitioner, and the advertisements in the back of the book, amounted to "pandering," and since the jury had the right to disregard expert opinion, the jury was justified in finding that the prosecution had sustained its burden of proving that the material was utterly lacking in social importance (App. Pet. B, pp. 12-14). It should be noted at this point that the Complaint against petitioner never made any charge of "pandering"; the case was never tried on a theory of "pandering"; the jury was never instructed that it could consider evidence of "pandering" in reaching a verdict; and, indeed, the prosecution in its brief on rehearing conceded that the concept of pandering could not be constitutionally applied to petitioner. The Court also rejected the contention that the book "Suite 69" is not obscene. Without indicating the distinction between the book herein and comparable books found to be constitutionally protected by this Court, the Appellate Department held that "Suite 69" was obscene and not entitled to constitutional protection.

Following the rendition of the aforesaid judgment of October 27, 1971, petitioner filed a due and timely petition for rehearing or, in the alternative, for certification of transfer to the Court of Appeal, pursuant to

Rule 63 of the California Rules of Court. It was argued in the first place that the Appellate Department had mistakenly relied upon statutes passed after the commission of the alleged offense in order to justify the affirmance of the conviction upon the doctrine of "pandering" as a substitute for evidence in the record that the book was utterly without redeeming social importance. The petitioner pointed out that California Penal Code §§311(a)(2) and 312.1 did not become effective until November 10, 1969, and that the commission of the offense as charged in the Complaint of June 3, 1969, allegedly occurred on May 14, 1969, some six months before the passage of the said statutes. Moreover, the Supreme Court of California had held some two years before that the doctrine of pandering could not be invoked where no such charge was contained in the accusation and where the state legislature had created no such crime. *People v. Noroff*, 67 Cal. 2d 791, 433 P. 2d 469, 63 Cal. Rptr. 575 (1967).

The attention of the Court was called to the fact that the charge of pandering had never appeared in the accusation in the case herein; that the case was never tried on a theory of "pandering"; that the proof did not establish such "pandering"; and that the jury had never been instructed upon any such theory. It was urged that the Court had failed to recognize that there was a complete absence of proof in the record of an essential element of the offense, to wit, that the book was utterly without redeeming social importance. Petitioner urged upon the Court that its judgment deprived petitioner of his liberty without due process of law and unconstitutionally subjected him to an *ex post facto* application of the laws.

Petitioner also urged upon the Court that the book herein involved was not different in the constitutional sense from the books held to be constitutionally protected by this Court.

The aforesaid petition for rehearing was granted by the Appellate Department on November 10, 1971 (App. Pet. D). In Respondent's brief on rehearing, it was conceded that petitioner had not been prosecuted under any theory of pandering; that instructions had not been given to the jury on such issue; and that the prosecution "did not argue this concept at trial and/or on appeal" [A. 481]. The prosecution admitted that "the case herein will have to be decided on the book *per se*, plus the evidence pertaining to scienter" [A. 482]. In short, the prosecution agreed that the Court had misapplied the California statutes enacted after the commission of the alleged offense, but argued that the judgment should be affirmed in any event.

On February 7, 1972, the Appellate Department, following rehearing, filed its second opinion and judgment and again affirmed petitioner's conviction [App. Pet. A]. In most respects the Court merely reiterated its prior opinion. The Appellate Department held that the book "Suite 69" is obscene and not entitled to constitutional protection; that the appropriate community standard is that of the State rather than the Nation as a whole, even in a case involving a book intended for nation-wide dissemination; that the question of prurient appeal need not be measured by the book's impact upon its actual and intended audience, even though the prosecution had stipulated that the petitioner neither disseminated the book to minors nor thrust it upon the general public; that the burden of persuasion rested initially with an accused in an obscenity prosecution

on the issue of redeeming social value; that although the only evidence in the record on the issue of social value had been produced by petitioner, nevertheless the jury was entitled to disregard such testimony; and that the prosecution had sufficiently met its burden on the element of social value when evidence of "pandering" appeared in the record. The Court held that the concept of pandering enunciated by this Court in *Ginzburg v. United States*, 383 U.S. 463, and reiterated in *Memoirs v. Massachusetts*, 383 U.S. 413, must always have been deemed to be the law in California; that the statutes enacted after the commission of the alleged offense herein merely codified such pre-existing law; and that therefore the retroactive application of the statutes did not deprive Petitioner of his liberty without due process of law nor his right to a jury trial, did not subject him to any *ex post facto* application of the laws nor subject petitioner to deprivation of his liberty on a charge never made and a theory never tried.

On the same date as the rendition of the aforesaid judgment, the Appellate Department filed an order certifying the cause to the Court of Appeal, pursuant to Rule 63(a) and (3), California Rules of Court (App. Pet. E). The Appellate Department stated in its certification that the transfer "appears necessary to settle important questions of law." The questions so presented were: (1) Is the proper community standard in an obscenity prosecution for sale of a book that of the State of California or a national standard?; (2) Is it proper to place the burden of going forward with evidence as to the redeeming social value of matter which meets the tests of appeal to prurient interest and exceeding customary standards on the defendant?; (3) If the answer to the previous question is in the

affirmative, what is the burden of the People in meeting defendant's evidence of redeeming social value?; (4) In California may evidence of the circumstances of production, presentation, sale, dissemination, distribution or publicity constitute sufficient evidence of lack of redeeming social value either under the case of *A Book v. Attorney General (Memoirs)* [1966] 383 U.S. 413, 420 [16 L. Ed. 2d 1, 6, 86 S. Ct. 975] or under Penal Code Sec. 311(a)(2)?; and, (5) May Penal Code Sec. 311(a)(2) be applied in a prosecution for sale or distribution of obscene matter where the sale or distribution occurred before the effective date of such provision?

On February 17, 1972, the Court of Appeal of the State of California, Second Appellate District, Division Three, made its order denying transfer of the cause (App. Pet. F).

Summary of Argument.

1. Petitioner was convicted for selling a book to an adult, a policeman, who stated that he wanted it for his personal use. The prosecution stipulated that petitioner did not intrude upon the privacy of the general public by thrusting his books upon an unwilling public and did not sell his books to minors. On this record, there is no more danger of dissemination of sexually explicit material to minors nor of an assault by such material on the general public than was presented in *Stanley v. Georgia*, 394 U.S. 557. The sale of a "sexy" book to a consenting adult, in an appropriately controlled bookstore, is protected by the free speech and press provisions of the First and Fourteenth Amendments because an adult person has a right to a private sphere of beliefs, thoughts and emotions. The

constitutional zone of privacy recognized in *Stanley* remains with the consenting adult when he enters a bookstore. Whether this constitutional right is viewed as a First Amendment right, a privacy right, or as an interrelationship of both, it is clear that petitioner's conviction cannot stand consistent with the constitutional principles enunciated in *Stanley v. Georgia*.

2. The sale of a sexually explicit book to a consenting adult when surrounded by notice to the public of its nature and by reasonable protection against exposure to juveniles, is not obscene because the American public does not find such a sale "patently offensive." Moreover, a sale of such a book to a consenting adult has social value and does not appeal to prurient interest. Since 1957, this Court has struggled to find an accommodation between the constitutionally protected interest in free speech and the legitimate public interest in controlling activities which fall under the broad category of obscenity. In doing so, members of the Court have repeatedly recognized that whether a publication is obscene or unconditionally protected speech depends largely upon the effect that the publication may have upon those who receive it. It has been recognized that the same publication may have a different impact "varying according to the part of the community it reached." When *Roth* was decided, the Court was aware of the fact that "obscenity" was not a precise concept and that its scope could not remain static. Accordingly, the Court fashioned a rule designed for changing times. In the 15 years that have elapsed since *Roth* was decided, American society has undergone great changes in its attitudes towards sex and in its attitudes towards the open, frank depiction of sexual matters, par-

ticularly to consenting adults. The Commission on Obscenity and Pornography, created by Congress in 1967, engaged in a thorough study of sexual materials to determine the effect of exposure to such material and the American public's attitude toward the circulation of such material. The Commission engaged in a great deal of independent research and conducted a national survey. The results of the Commission's scientific investigation reveal that a majority of the American people believe it appropriate to sell or exhibit sexually explicit material to consenting adults. The studies also reveal that such material has substantial value to a significant number of Americans and that such material appeals to the normal curiosity of the average person rather than to his "prurient interest." Recent cases also recognize that such material has social value and, when distributed to consenting adults does not appeal to prurient interest and is not patently offensive. The statute herein cannot be applied constitutionally to the sale herein. The statute can be constitutionally applied only if the State alleges, in its accusatory pleading, and proves, that the sale of a challenged book patently offends contemporary standards and appeals to prurient interest and is utterly without redeeming social value because the sale was not surrounded by a notice to the public of the challenged book's nature and by reasonable protection against exposure to juveniles.

3. The book "Suite 69" is not obscene when measured by similar books afforded constitutional protection by this Court. The book consists of words only—it is pure speech. It contains no pictures, it was not pandered, it was not sold to a minor and it was not thrust upon the general public. *Redrup v. New York*, 386 U.S. 767, and its progeny protect the book.

4. The jury, by its verdict, found that the book "Suite 69" was utterly without redeeming social value. This judgment was reached by the jury notwithstanding the fact that the State produced no evidence to this effect and petitioner produced expert testimony that the book did have social value. The said conviction denied petitioner due process of law. Moreover, the State denied petitioner due process of law by construing its obscenity statute as shifting the burden of producing evidence on the element of social value to the defendant once the prosecution produces evidence that the material appeals to prurient interest and exceeds customary limits of candor. Such a construction is unreasonable and unconstitutionally undermines the presumption of innocence which accompanies the accused and which extends to every element of the charged offense.

5. Petitioner was convicted upon the theory that proof of "pandering" may serve as a substitute for proof by the prosecution that the book is utterly without redeeming social importance. This reliance on the "pandering" doctrine was made although no charge of pandering was made in the accusatory pleading and no proof of pandering was adduced at trial. Petitioner's conviction was affirmed in reliance on "pandering" even though the jury was never instructed on that issue and the prosecution itself conceded that pandering could not be invoked to confirm the conviction because the state "pandering" statute became effective long after petitioner sold the book in question. In short, petitioner was convicted of pandering although he was not informed, by statute, charge or jury instruction, that pandering was involved in his case. Such a conviction plainly violates due process of law and renders

the statute unconstitutional as applied. *Rabe v. Washington*, 405 U.S. 13.

6. The trial court erroneously instructed the jury to judge the book on the basis of state standards, rather than national standards. The First Amendment, of course, is national in scope and no book should be condemned and placed outside the protection of the First Amendment unless it offends national standards. A national Constitution permits nothing less.

I

California Penal Code §§311 and 311.2, as Construed and Applied to Authorize the Judgment of Conviction of Petitioner Herein, Where the Sole Evidence in the Record Establishes That Petitioner, a Retail Bookseller, Sold the Book to an Adult Who Requested the Book and Purchased It, Ostensibly for His Personal Use, and Where the Prosecution Stipulated That Petitioner Neither Sold the Material in His Bookstore to Minors nor Thrust It Upon the General Public, Deprive Petitioner of His Liberty and Property Without Due Process of Law and Abridge Petitioner's Exercise of Freedoms of Speech and Press, Contrary to the Free Speech and Press and Due Process Provisions of the First and Fourteenth Amendments.

In *Roth v. United States*, 354 U.S. 476, the Court held that obscenity, like libel and "fighting words," was not within the area of constitutionally protected speech, and thus could be regulated by the states without regard to whether the utterance was shown to create a clear and present danger of antisocial conduct or shown to probably induce its recipients to such conduct. At the same time, the Court stated that "sex and obscenity are not synonymous" and that sex "is

one of the vital problems of human interest and public concern" (354 U.S. at 487). Although obscenity, properly defined, was held to be non-speech because "utterly without redeeming social importance" (354 U.S. at 484), the Court emphasized that it was vital that the standards for judging alleged obscenity "safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest." (354 U.S. at 488). Thus, the Court in *Roth* recognized that "obscenity" is not a talismanic label sufficient to insulate from constitutional scrutiny all state action directed against it.

The Court's decisions following *Roth* have consistently measured state attempts to suppress obscenity against constitutional guarantees. Thus, in *Smith v. California*, 361 U.S. 147, the Court stated: "The existence of the State's power to prevent the distribution of obscene matter does not mean that there can be no constitutional barrier to any form of practical exercise of that power." (361 U.S. at 155). In *Marcus v. Search Warrants of Property*, 367 U.S. 717, the Court held that every obscenity proceeding implicates First Amendment questions. In that case, the state statutory search and seizure procedures "lacked the safeguards which due process demands to assure nonobscene material the constitutional protection to which it is entitled." (367 U.S. at 731). In *Quantity of Copies of Books v. Kansas*, 378 U.S. 205, the Court emphasized that a state was not free to adopt whatever procedures it pleased for dealing with obscenity without regard to the possible consequences for constitutionally protected speech. No verbal formula capable of repressing expression—be it obscenity, libel, or fighting words—is immune from this Court's concern for the protection of constitutional

rights. Compare, *Beauharnais v. Illinois*, 343 U.S. 250, with *New York Times Co. v. Sullivan*, 376 U.S. 254; and *Chaplinsky v. New Hampshire*, 315 U.S. 568, with *Gooding v. Wilson*, 405 U.S. 518.

In such cases as *Smith, Marcus*, and *Quantity of Copies of Books*, the Court has weighed the States' interest in suppressing obscenity against the individual and social interest in the free flow of ideas. Similarly, in *Stanley v. Georgia*, 394 U.S. 557, the Court held that no state interest in regulating obscenity justified a criminal prosecution for private possession of obscenity. The Court balanced the various asserted state interests in prohibiting private possession of obscenity against the individual's "right to receive information and ideas, regardless of their social worth" (394 U.S. at 564), and the individual's "right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy." (394 U.S. at 564). Protection of the individual's right to receive information and ideas, regardless of their social worth, required a sphere of privacy from governmental intrusions into citizens' "beliefs, their thoughts, their emotions and their sensations." (394 U.S. at 564). The necessary relationship between First Amendment freedoms and the right of privacy was recognized in *Stanley* by the citation of *NAACP v. Alabama*, 357 U.S. 449, 462 ("This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. . . . Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association"). The right of privacy protected in *Stanley* was not simply the privacy of the home, as protected by the Fourth Amendment, but the privacy of the mind and heart—the

privacy of an individual's beliefs, thoughts, emotions and sensations.

In *Stanley*, 394 U.S. 557, the initial argument made by the State was that under *Roth* obscenity is simply not constitutionally protected, and therefore the State was free to deal with obscenity in any manner. To this argument, the Court made the following reply: "*Roth* and its progeny certainly do mean that the First and Fourteenth Amendments recognize a valid governmental interest in dealing with the problem of obscenity. But the assertion of that interest cannot, in every context, be insulated from all constitutional protections. Neither *Roth* nor any other decision of this Court reaches that far." (394 U.S. at 563) (Emphasis added).

The Court secondly rejected Georgia's argument that obscenity is no essential part of any exposition of ideas. "Nor is it relevant that obscene materials in general, or the particular films before the Court, are arguably devoid of any ideological content. The line between the transmission of ideas and mere entertainment is much too elusive for this Court to draw, if indeed such a line can be drawn at all." 394 U.S. at 566.

The State argued in *Stanley* that it had an interest in protecting the individual's mind from the effects of obscenity. The argument, in essence, amounted to an assertion by the State of the right to control the moral content of a person's thoughts. The Court replied that this may be a noble purpose to some, "but it is wholly inconsistent with the philosophy of the First Amendment." As in *Kingsley Int'l Pic. Corp. v. Regents*, 360 U.S. 684, 688-689, obscenity cannot be suppressed on ideological or theological grounds. The

Constitution protects the right to receive information and ideas, "regardless of their social worth." 394 U.S. at 564, 565-566.

The State contended that it had a justifiable interest in preventing exposure to obscene materials which might lead to deviant sexual behavior or crimes of sexual violence. The Court replied that there appeared to be little empirical basis for that assertion.² "But more important, if the State is only concerned about printed or filmed materials inducing antisocial conduct, we believe that in the context of private consumption of ideas and information we should adhere to the view that 'among free men, the deterrents ordinarily to be applied to prevent crime or education and punishment for violations of the law . . .'" 394 U.S. at 566-567.

Finally, the State argued in *Stanley* that prohibition of possession of obscenity was a necessary incident to state statutes proscribing public dissemination of such material. The Court rejected this argument also, stating that "the individual's right to read or observe what he pleases . . . is so fundamental to our scheme of individual liberty, its restriction may not be justified by the need to ease the administration of otherwise valid criminal laws." 394 U.S. at 568. The Court concluded, "We hold that the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime." 394 U.S. at 568.

²"Extensive empirical investigation, both by the Commission and by others, provides no evidence that exposure to or use of explicit sexual materials play a significant role in the causation of social or individual harms such as crime, delinquency, sexual or nonsexual deviancy, or severe emotional disturbances." (*The Report of the Commission on Obscenity and Pornography*, September, 1970, United States Government Printing Office, p. 52).

The Court in *Stanley* identified two legitimate state interests in regulating obscenity: "The danger that obscene material might fall into the hands of children, see *Ginsberg v. New York* [citation], or that it might intrude upon the sensibilities or privacy of the general public. See, *Redrup v. New York*, 386 U.S. 767, 769. . . ." 394 U.S. at 567. The Court found that no such dangers were present in the case before it, and therefore the State had no interest sufficient to justify its prosecution.

In *United States v. Reidel*, 402 U.S. 351, the Court upheld the constitutional validity of 18 U.S.C. 1461 as applied to the commercial dissemination of obscenity through the mails to persons "who state that they are adults." 402 U.S. at 352. The Court held that in dismissing the indictment prior to trial, "the District Court gave Stanley too wide a sweep." 402 U.S. at 355. The Court reiterated its adherence to *Roth v. United States*, 354 U.S. 476, and like cases which "have interpreted the First Amendment not to insulate obscenity from statutory regulation." 402 U.S. at 356. The danger that obscene matter might fall into the hands of children or that it might intrude upon the sensibilities or privacy of the general public, dangers which were not present in *Stanley v. Georgia*, 394 U.S. 557, were potentially present in *Reidel* where the case reached the Court prior to trial. Justice Marshall, concurring in *Reidel*, stated that "Any such mail order distribution poses the danger that obscenity will be sent to children, and although [Reidel] indicated his intent to sell only to adults who requested his wares, the sole safeguard designed to prevent the receipt of his merchandise by minors was his requirement that buyers declare their age." 402 U.S. at 361. Justice Marshall stated his belief "that

distributors of purportedly obscene merchandise may be required to take more stringent steps to guard against possible receipt by minors. This case comes to us without the benefit of a full trial, and, on this sparse record, I am not prepared to find that appellee's conduct was not within a constitutionally valid construction of the federal statute." 402 U.S. at 361-362.

The present case does come before the Court after a full trial, and upon a record establishing that petitioner sold the book in question to an adult police officer who requested it, and purchased it, ostensibly for his own personal enjoyment. Concededly, petitioner neither disseminated his wares to minors, nor thrust them upon the general public. The prosecution's case consisted entirely of proving a discreet, consensual adult transaction. On the present record, there is no more danger of dissemination to minors nor assault upon the general public than was presented by the record in *Stanley*. Nor did petitioner pander the book to his willing customer in the sense that "pandering" was identified in *Ginzburg v. United States*, 383 U.S. 463. Under the facts of this case, California's prosecution of petitioner is no more justified than was Georgia's prosecution of *Stanley*.

The individual's right to a private sphere of beliefs, thoughts, emotions and sensations, the "right to read or observe what he pleases" (*Stanley v. Georgia*, 394 U.S. 557, 558), is not forfeited when a citizen leaves his home. "Solitude or isolation has never been a precondition to the Constitution's protection of other phases of the right of privacy. See, *Katz v. United States*, 389 U.S. 347 . . . ; *Griswold v. Connecticut*, 381 U.S. 479, . . . ; *NAACP v. Alabama Ex Rel. Patterson*, 357 U.S. 449. . . . The First Amendment pro-

fects others than the 'hermit and the recluse.'" *United States v. Dellapia*, 433 F. 2d 1252, 1258 (2 Cir. 1970). See, *Eisenstadt v. Baird*, 405 U.S. 438. The constitutional zone of privacy recognized in *Stanley* remains with the consenting adult citizen when he enters a bookstore. The citizen's right to satisfy his intellectual and emotional needs by reading whatever he chooses in the privacy of his home, is dependent upon his ability to lawfully obtain that which he chooses to read.

Petitioner therefore asserts the right of his adult customer to obtain the book of his choice to read in the privacy of his home. Petitioner has standing to assert such rights. *Griswold v. Connecticut*, 381 U.S. 479, 481; *Eisenstadt v. Baird*, 405 U.S. 438.

Whether the constitutional right recognized by the Court in *Stanley v. Georgia*, 394 U.S. 557, is viewed as a First Amendment right, a right of privacy, or, as petitioner contends, an interrelationship of both, it is clear that petitioner's conviction cannot stand consistent with established constitutional principles. Since petitioner's conviction for selling a book to a consenting adult does abridge that adult's right to read what he chooses in the privacy of his home, however that fundamental right is characterized, it cannot be abridged "simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose." *Griswold v. Connecticut*, 381 U.S. 479, 497 (concurring opinion of Justice Goldberg). State laws regulating the public dissemination of obscene matter may serve legitimate state interests in protecting children and preventing assaults upon the privacy of the general public, but nevertheless a "governmental purpose to control or prevent activities con-

stitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.' NAACP v. Alabama, 377 U.S. 288, 307. . . ." *Griswold v. Connecticut*, 381 U.S. 479, 485. The legitimate interests which California's general obscenity statute may serve simply do not extend to the consensual adult transaction for which petitioner was convicted.

II.

The Sale of a Sexually Explicit Book to a Consenting Adult When Surrounded by Notice to the Public of Its Nature and by Reasonable Protection Against Exposure to Juveniles, Does Not Patently Offend Contemporary Standards, Does Not Appeal to Prurient Interest and Has Social Value.

In Point I, petitioner assumed, *arguendo*, that the book in question was obscene, but that the State's power to proscribe obscenity as constitutionally unprotected could not be exercised in the case at bar, where the book was sold to a consenting adult and where it was stipulated that it was not thrust upon the general public. In this Point, petitioner urges that a book, sold to a consenting adult, surrounded by reasonable protection against exposure to juveniles is not obscene because a sale, under such circumstances, does not patently offend contemporary standards, does not appeal to prurient interest and has redeeming social value.

A. Fifteen years ago in *Roth v. United States*, 354 U.S. 476, this Court held that the First Amendment was no bar to the enactment of a narrowly confined obscenity statute. From the beginning, the Court recognized that the exclusion of obscenity from First Amendment protection created serious dangers to constitu-

tional guarantees. Accordingly, the Court stated in *Roth* (354 U.S. 476, 488):

"The fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests. . . ."

It is no secret that the passage of years since *Roth* was decided has not produced a coalescence of judicial opinion but instead of a multiplicity of standards. Mr. Justice Harlan, in 1968, noted that in 13 obscenity cases decided by the Court, from 1957 to 1968, there had been 55 separate opinions among the Justices. The situation has not improved in the intervening 5 years. *Stanley v. Georgia*, 394 U.S. 557; *United States v. Reidel*, 402 U.S. 351; *United States v. Thirty-Seven (37) Photographs*, 309 F. Supp. 36 (Cal. 1970); *Rabe v. Washington*, 405 U.S. 13.

Throughout this period this Court has struggled to find an accommodation between the constitutionally protected interest in free speech and the legitimate public interest in controlling activities which fall under the broad category of obscenity. Recognizing that constitutional doctrine in this area of the law is still in the formative stage (*Jacobellis v. Ohio*, 378 U.S. 184, 200, Warren, C. J. dissenting), this Court has viewed the problem from a variety of angles, seeking to find the best resolution of the opposing forces at play.

In *Butler v. Michigan*, 352 U.S. 380, the Court unanimously found that the standard for judging materials in general circulation could not be the susceptibility of the most vulnerable, or minors. *Roth*, of course, held that material must be measured by its impact on the "average person". Chief Justice Warren however recognized in his concurring opinion in *Roth* that the line dividing the "obscene" from unconditionally protected speech "is not straight and unwaivering". It depends largely, he said, "upon the effect that the materials may have upon those who receive them. It is manifest that the same object may have a different impact, varying according to the part of the community it reached." 354 U.S. at 495.

Chief Justice Warren developed this thought further in his dissenting opinion in *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 446. *Kingsley Books* was an *in rem* proceeding, not a criminal case in which the context of distribution was implicated. Emphasizing again that for him, it is manner of use that should determine obscenity, Chief Justice Warren said:

"There is totally lacking any standard . . . for judging the book in context. . . . In my judgment, the same object may have wholly different impact depending upon the setting in which it is placed." 354 U.S. at 446.

In *Jacobellis v. Ohio*, 378 U.S. 184, 195, the Court made the following observation:

"We recognize the legitimate and indeed exigent interest of States and localities throughout the Nation in preventing the dissemination of material deemed harmful to children. But that interest does not justify a total suppression of such material,

the effect of which would be to 'reduce the adult population . . . to reading only what is fit for children'. . . . State and local authorities might well consider whether their objectives in this area would be better served by laws aimed specifically at preventing distribution of objectionable material to children, rather than at totally prohibiting its dissemination."

In *Ginzburg v. United States*, 483 U.S. 463, the Court focused upon the context of distribution, finding the charged material obscene because it was pandered in an offensive manner rather than sold merely to persons who wished to obtain it. In *Ginzburg*, the Government drew a distinction between unsolicited, offensive mailing and mailing to interested persons. 383 U.S. at 472, n.13. At sentencing, the United States Attorney stated that the same book had previously been distributed to physicians without interference, and that if *Ginzburg* had not engaged in "widespread, indiscriminate distribution", there would have been no case.

In *Mishkin v. New York*, 383 U.S. 502, Mr. Justice Brennan explained that the use of the term "average person" in *Roth* was utilized "to serve the essentially negative purpose of expressing our rejection of that aspect of the *Hicklin* test . . . that made the impact of the most susceptible person determinative." 383 U.S. at 509. *Roth* was therefore adjusted as follows: "Where the material is designed for and primarily disseminated to a clearly defined . . . group, rather than the public at large, the prurient-appeal requirement of the *Roth* test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group." 383 U.S. at 508.

In *Redrup v. New York*, 386 U.S. 767, the Court also focused upon context of distribution. In holding various material not obscene, the Court said (386 U.S. at 769):

"In none of the cases was there a claim that the statute in question reflected a specific and limited state concern for juveniles. See *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645; cf. *Butler v. State of Michigan*, 352 U.S. 380, 77 S.Ct. 524, 1 L.Ed. 2d 412. In none was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it. Cf. *Breard v. City of Alexandria*, 341 U.S. 622, 71 S.Ct. 920, 95 L.Ed. 1233; *Public Utilities Comm'n of District of Columbia v. Pollak*, 343 U.S. 451, 72 S.Ct. 813, 96 L.Ed. 1068. And in none was there evidence of the sort of 'pandering' which the Court found significant in *Ginzburg v. United States*, 383 U.S. 463, 86 S.Ct. 942, 16 L.Ed.2d 31."

In *Ginsberg v. New York*, 390 U.S. 629, the Court adjusted the concept of obscenity to the empirical realities of the target audience—minors. The Court held that material which was not obscene when distributed to the general public could be constitutionally condemned as obscene under a statute which prohibited sale to minors. Mr. Justice Brennan quoted with approval what the New York court said in upholding the statute:

"... [M]aterial which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dissemination to children. In other words, the concept of ob-

scenity or of unprotected matter may vary according to the group to whom the questionable material is directed or from whom it is quarantined. Because of the State's exigent interest in preventing distribution to children of objectionable material, it can exercise its power to protect the health, safety, welfare and morals of its community by barring the distribution to children of books recognized to be suitable for adults." 390 U.S. at 636.

Mr. Justice Stewart, concurring, emphasized that the Constitution guarantees a "society of free choice". He drew a sharp distinction between voluntary and involuntary exposure to sexually explicit material, saying (390 U.S. at 649-650):

"When expression occurs in a setting where the capacity to make a choice is absent, government regulation of that expression may co-exist with and even implement First Amendment guarantees. So it was that this Court sustained a city ordinance prohibiting people from imposing their opinions on others 'by way of sound trucks with load and raucous noises on city streets.' And so it was that my Brothers BLACK—and DOUGLAS thought that the First Amendment itself prohibits a person from foisting his uninvited views upon the members of a captive audience.

"I think a State may permissibly determine that, at least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees. . . ."

In *Rowan v. U.S. Post Office Dept.*, 397 U.S. 728, the Court sustained special legislation protecting postal patrons from unsolicited mail advertisements which could not be deemed obscene under *Roth*. Again the Court emphasized the difference between voluntary and involuntary exposure to sexually explicit material, saying (397 U.S. at 738):

"We therefore categorically reject the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another. If this prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even 'good' ideas on an unwilling recipient. That we are often 'captives' outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere. See *Public Utilities Comm. of District of Columbia v. Pollak*, 343 U.S. 451, 72 S.Ct. 813, 96 L.Ed. 1068 (1952). The asserted right of a mailer, we repeat, stops at the outer boundary of every person's domain."

In the cases discussed above, the Court was concerned, primarily with the kinds of special situations that would render otherwise protected speech "obscene." *Stanley v. Georgia*, 394 U.S. 557, dealt with the problem of what situations would entitle otherwise "obscene" material to the protection of the First Amendment. After canvassing the area, the Court concluded that the State had two legitimate concerns—distribution to minors and thrusting sexual material

upon an unwilling audience. In striking down Georgia's obscenity statute because it was not related to any legitimate state interest, the Court held that a person had the right, secured by the First Amendment to read or view whatever he pleases, including what is sometimes described as "hard core pornography." See, *Ginzburg v. United States*, 383 U.S. at 499, n. 3.

A number of courts, in analyzing *Stanley*, concluded that *Stanley* in effect overruled *Roth*. *United States v. Reidel*, U.S.D.C. C.D. Cal. No. 5845-HP, reversed 402 U.S. 351; *United States v. Thirty-Seven (37) Photographs*, U.S.D.C. C.D. Cal. No. 69-2422-F, reversed 402 U.S. 363; *Keralexis v. Byrne*, 306 F. Supp. 1363 (Mass. 1969), vacated and remanded 401 U.S. 216; *Hayse v. Van Hoomissen*, 321 F. Supp. 642 (Ore. 1970), vacated and remanded 403 U.S. 927; *United States v. Orito*, U.S.D.C. E.D. Wis. No. 70-CR-20, pending on re-argument No. 70-69; *Stein v. Batchelor*, 300 F. Supp. 602 (Texas 1969), vacated on other grounds *Dyson v. Stein*, 400 U.S. 200.

Other courts, also recognizing that *Stanley* had effectuated a fundamental change in the obscenity laws, concluded that the statute could be saved by construing it narrowly. *United States v. Dellapia*, 433 F. 2d 1252 (2 Cir. 1970); *United States v. Various Articles of "Obscene" Merchandise*, 315 F. Supp. 191 (S.D. N.Y. 1970); *United States v. Lethe*, 312 F. Supp. 421 (E.D. Cal. 1970).

In *Dellapia*, the Court felt obliged, under *Stanley*, "to reinterpret the Act in the light of constitutional

doctrine which never illuminated the problems of obscenity legislation with glaring brightness but which now appears to be shifting as well." 433 F. 2d at 1253. Believing that *Stanley* opened a "new chapter" in the obscenity saga, the Court asked:

"Where does *Stanley* locate the boundary between the government's right to control obscene matter deemed inimical to public order or the public morality and the right of individuals to keep to themselves? Is there a first amendment privilege to exchange and enjoy in private, letters, stories, books, movies—or spoken words—however sordid?" *Id.* at 1255.

An analysis of *Stanley* led the Court to conclude that these questions can only be answered "by a case-by-case accommodation of legitimate, compelling interests," and that Dellapia's conduct was protected by *Stanley* "Since the government has shown no special circumstances that would justify" his prosecution. *Id.* at 1255. In reaching this conclusion, the Court did not question "the doctrine that under Roth obscenity remains unprotected by the first amendment." *Id.* at 1256. In determining whether the obscenity law should be applied to Dellapia's conduct, however, the Court stated that legitimate government interests "include possible harm to Dellapia and his correspondents from their own use of the obscene films; harm that they might do to others as a result of viewing the films; harm that might be done if the films reached other eyes . . . (especially minors'); and any deterioration in public morals that might result if the government is powerless to proscribe such activity as Dellapia's." *Id.* at 1256.

The nub of the Court's holding, in *Dellapia*, is to be found in the following paragraph:

"Although the words 'public decency' carry with them uncertainty and imprecision, it is difficult to quarrel with the proposition that things public should be decent. We are increasingly aware of polluted air, rivers, and streets, and we resent their assault upon our senses. When there is inflicted upon one a sexually offensive public display, his right to be let alone is impaired. Things unobjectionable in private may be embarrassing and offensive in a crowd, and the general public includes adults as well as children. By our decision we do not sanction 'the public affront.' . . ." *Id.* at 1256-1257.

In *United States v. Various Articles of "Obscene" Merchandise*, 315 F. Supp. 191 (S.D. N.Y. 1970), the Court held that the most sexually explicit, the most tasteless material can invoke constitutional protection under certain circumstances. The Court saw *Stanley* as a return to "orthodox First Amendment considerations". In balancing the respective competing interests, the Court found the statute in question, 19 U.S.C. §305, overbroad, as applied to the importation of sexually explicit material by a private person for private use. The Court however did not feel compelled to invalidate the statute. Instead, the Court construed the statute narrowly, to forbid its application to private importation.

In *United States v. Reidel*, 402 U.S. 351, and *United States v. 37 Photographs*, 402 U.S. 363, the Court rejected petitioners' arguments that *Stanley* had in effect struck down virtually all obscenity laws—

federal and state. In those cases, the Court held, as it had in *Roth*, that Government may proscribe obscenity as such.

B. “*Roth’s* evident purpose [was] to tighten obscenity standards”. *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 487. Indeed, this Court has been called upon repeatedly to keep the door “tightly closed” to prevent intrusion upon constitutionally protected works dealing with sex.³ In *New York Times Co. v. Sullivan*, 376 U.S. 254, 285, the Court explained its special concern in such cases, saying:

“We must . . . in proper cases review the evidence to make certain that [constitutional] principles

³*Kois v. Wisconsin*, 92 S. Ct. 2245; *Wiener v. California*, 92 S. Ct. 534; *Harstein v. Missouri*, 92 S. Ct. 531; *Burgin v. South Carolina*, 92 S. Ct. 46; *Bloss v. Michigan*, 402 U.S. 938; *Childs v. Oregon*, 401 U.S. 1006; *California v. Pinkus*, 400 U.S. 922; *Hoyt v. Minnesota*, 399 U.S. 524; *Carlos v. New York*, 396 U.S. 119; *Cain v. Kentucky*, 397 U.S. 319; *Bloss v. Dykema*, 398 U.S. 278; *Walker v. Ohio*, 398 U.S. 434; *Henry v. Louisiana*, 392 U.S. 655; *Felton v. Pensacola*, 390 U.S. 340; *Robert-Arthur Management Corp. v. Tennessee*, 389 U.S. 578; *I. M. Amusement Corp. v. Ohio*, 389 U.S. 573; *Chance v. California*, 389 U.S. 89; *Central Magazine Sales, Ltd. v. United States*, 389 U.S. 50; *Potomac News Co. v. United States*, 389 U.S. 47; *Connor v. City of Hammond*, 389 U.S. 48; *Schackman v. California*, 388 U.S. 454; *Cobert v. New York*, 388 U.S. 443; *Ratner v. California*, 388 U.S. 442; *Avansino v. New York*, 388 U.S. 446; *Rosenbloom v. Virginia*, 388 U.S. 450; *Sheperd v. New York*, 388 U.S. 444; *Mazes v. Ohio*, 388 U.S. 453; *Friedman v. New York*, 388 U.S. 441; *Keney v. New York*, 388 U.S. 440; *Corinth Publications, Inc. v. Wesberry*, 388 U.S. 448; *Quantity of Copies of Books v. Kansas*, 388 U.S. 452; *Books, Inc. v. United States*, 388 U.S. 449; *Aday v. United States*, 388 U.S. 447; *Gent v. Arkansas*, 386 U.S. 767; *Austin v. Kentucky*, 386 U.S. 767; *Redrup v. New York*, 386 U.S. 767; *Memoirs v. Massachusetts*, 383 U.S. 413; *Tralins v. Gerstein*, 378 U.S. 576; *Grove Press, Inc. v. Gerstein*, 378 U.S. 577; *Jacobellis v. Ohio*, 378 U.S. 184; *Manual Enterprises, Inc. v. Day*, 370 U.S. 478; *Kingsley Int’l. Pic. Corp. v. Regents*, 360 U.S. 684; *Sunshine Book Co. v. Summerfield*, 355 U.S. 372; *One, Inc. v. Olsen*, 355 U.S. 371; *Times Film Corp. v. Chicago*, 365 U.S. 43.

have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across 'in the line between speech unconditionally guaranteed and speech which may be legitimately regulated.' . . . In cases where that line must be drawn, the rule is that 'we examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protected.' "

Two of the cases cited in support of this proposition were obscenity cases where the Court found, as a matter of law, that the charged material was entitled to constitutional protection. *One, Inc. v. Olesen*, 355 U.S. 371 (1958); *Sunshine Book Co. v. Summerfield*, 355 U.S. 372 (1958).

When *Roth* was decided in 1957, the Court was aware of the fact that the concept of obscenity was not precise and that its scope could not remain static. Accordingly, the Court fashioned a rule that was designed to adapt to changing times. Challenged material was to be measured by its appeal to prurient interest, applying contemporary community standards. In *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, the Court held that material had to be, *inter alia*, patently offensive to contemporary standards. Under the Court's definition of obscenity, that concept "is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened. . . ." *Weems v. United States*, 217 U.S. 349, 378. What is obscenity changes "in the light of contemporary human knowledge. . . ." *Robinson v. California*, 370 U.S. 660, 666, as the social sciences provide "an understanding of the motive forces

of human conduct". *Furman v. Georgia*, 405 U.S. 2726. In *Smith v. California*, 361 U.S. 147, Mr. Justice Frankfurter, concurring, emphasized that the determination of obscenity is made on the basis of contemporary community standards, saying (361 U.S. at 165-166):

"... Can it be doubted that there is a great difference in what is to be deemed obscene in 1959 compared with what was deemed obscene in 1859? The difference derives from a shift in community feeling regarding what is to be deemed prurient or not prurient by reason of the effects attributable to this or that particular writing. Changes in the intellectual and moral climate of society, in part doubtless due to the views and findings of specialists, afford shifting foundations for the attribution."

Justice Frankfurter then spoke of the light that could and should be shed on contemporary standards by those social scientists "who give their life to such inquiries" (361 U.S. at 166).

In 1967, Congress enacted Public Law 90-100, creating the Commission on Obscenity and Pornography. Its assigned tasks were to make "a thorough study [of obscene materials] which shall include a study of the causal relationship of such materials to antisocial behavior" and "to recommend advisable, appropriate, effective, and constitutional means to deal effectively with such traffic in obscenity and pornography." Public Law 90-100 required the President of the United States to appoint eighteen members to the Commission. These were to include "psychiatrists, sociologists, psychologists, criminologists, jurists, lawyers, and others from organizations and professions who have special and practical

competence or experience with respect to obscenity laws and their application to juveniles." A list of the members of this Commission and their biographic is contained in *The Report of the Commission on Obscenity and Pornography*, U.S. Government Printing Office, September 1970, pp. 634-639. The Commissioners included: the Dean of a major law school; a member of the Court of Appeals of New York;⁴ the Chief Judge of a state juvenile court; the Attorney General of California; the Director of a major university library; three clergymen; two psychiatrists specializing in children and youth—one associated with the Menninger Foundation, and the other the Chairman of the Department of Psychiatry at a major university; three sociologists—two from universities (one the Chairman of the Department) and one from a major television and radio network; a professor of film art; the President of a major magazine distribution agency; the Executive Vice President of a major paperback book publishing company; the Deputy Attorney of the Motion Picture Association of the United States; a professor of English; and the founder of a national anti-pornography organization. Three of the Commission members had served as leaders of anti-pornography organizations. Two members were women. The Chairman and Vice Chairman were elected by the Commissioners.

The General Counsel of the Commission was Paul Bender, who represented the Government in *Ginzburg v. United States*, 383 U.S. 463.

For the purpose of obtaining information relevant to the Commission's tasks, the Commission organized itself into four "panels", dealing with (1) Traffic in

⁴Who resigned from the Commission to become a United States Ambassador about midway through the life of the Commission.

sexual materials; (2) The effects of sexual materials; (3) Nonregulatory or "positive" approaches such as sex education, media self-regulation and citizen-action groups; and (4) Law and law enforcement. These panels acted under guidelines prescribed by the Commission as a whole to formulate detailed research programs in order to obtain relevant information. The panels reported to the full Commission every several months, and submitted final panel reports and the underlying research studies to the Commission during the spring and summer of 1970. The full panel reports are presented in the Commission's Report at pages 73-369. The underlying detailed research reports were published in about nine volumes of Commission "Technical Reports". The Commission as a whole made factual findings based upon its research and the panel reports. These findings appear at pages 7-44 of the Commission's Report. These findings formed the basis for the Commission's recommendations, at pages 47-69 of the Commission's Report.

The Commission used several different research methods to obtain relevant information. Existing studies, literature, court decisions and statutory provisions were read and analyzed. Experts in various fields were interviewed or asked to submit papers to the Commission based upon existing knowledge. Approximately 100 national organizations were invited to express their views through written statements and views were selected from law enforcement officers, lawyers generally, and hundreds of Constitutional Law experts. Original research to discover information not previously available was conducted through surveys, controlled experiments and "quasi" experimental methods which could not include a scientifically selected "con-

rol" group. Detailed descriptions of these various original research methods are contained at pages 150-154 of the Commission's Report.

A major research effort of the Commission was a national survey of Americans which involved lengthy face-to-face interviews with a random probability sample of more than 3,000 persons in the continental United States. Such a survey employing scientifically selected probability samples may be generalized to the population of the United States as a whole within known limits of error.

In the area of law enforcement, the Commission also utilized a detailed written survey of state and municipal prosecutors in the United States. This survey was addressed to all prosecutors in large counties and cities, and to a declining percentage of prosecutors in smaller jurisdictions. A large rate of response to this survey was obtained, indicating a high degree of accuracy.

The Commission also obtained information and views through public hearings held in Washington, D.C., and Los Angeles, California, in May 1970. Fifty-five persons representing law enforcement agencies, courts, government at many levels, civic organizations, writers, publishers, distributors, film producers, exhibitors, actors, librarians, teachers, youth organizations, parents and other interested groups were invited to appear, and 31 persons accepted these invitations. Their names and affiliations are set forth at pp. 642-646 of the Commission's Report. At these hearings—and in correspondence directed to the Commission—the Commission also was given the views of numerous private citizens.

A careful study of the Commission Report demonstrates, it is respectfully submitted, that the sale of a

book to a consenting adult in a book store, which fairly notifies the public that it contains sexually explicit material, is not now obscene, no matter how explicit or tasteless the book may be thought to be. Such a sale to a consenting adult is not patently offensive to contemporary standards, does not appeal to prurient interest, and has some social value.

When the definition of "obscenity" was first adopted by the Court in *Roth*, sexual materials as distributed within the United States almost always fell easily into one of two categories. Some sexual materials, not of a high degree of sexual explicitness—such as semi-nude "pin-ups", nudist magazines with no sexual activity, pulp and pocketbook romances with only generally described sexual activity, and non-illustrated marriage manuals of a moderate degree of explicitness—were generally sold and distributed openly through lawful channels. Highly explicit sexual materials, on the other hand, which graphically depicted or described genital organs or sexual activity and all its variations—so called "hard core pornography"—were sold or distributed under-the-counter with a consciousness on the part of all concerned that the material was forbidden because "obscene". In such a situation, it might be said that hard core pornography sold under-the-counter, with a consciousness on the part of all concerned that the material was forbidden, met the test of obscenity enunciated in *Roth*. Thus, Mr. Justice Stewart could say even as late as 1964, that while accurate verbal definition of the illegally obscene was impossible, "I know it when I see it." *Jacobellis v. Ohio*, 378 U.S. 184, 197. Justice Stewart and others could easily recognize "obscene" material and distinguish it from the non-obscene, both because the market place treated the two

kinds of material as being of a different nature, and because the material itself was of a dramatically different sexual content.

In the last five to seven years, however, contemporaneously with dramatic changes in American sexual practices and attitudes (brought on, in some substantial degree, by scientific advances in contraception, as well as by changing moral standards in many areas), there has been an enormous change in the pattern of distribution of explicit sexual materials. This development is described in some detail in the Traffic Panel Report of the Obscenity Commission, at pp. 113-117 of the Commission's Report. Today, material with a degree of sexual explicitness formerly found only in under-the-counter books and films, is present (often in dominant part) in best-selling novels from major publishers, in best-selling non-fiction works of the marriage manual type, in first-run motion picture films from major studios, and in mass circulation magazines which are among the most important vehicles for product advertising by American businesses. This trend toward greater explicitness in openly sold mass-market over-the-counter materials has continued in the year since the Commission's Report, so that today there is virtually no sexual content, formerly found in under-the-counter materials, which is not present in books, magazines, and films which are freely available in theatres and retail outlets in all parts of the country.

The courts have recognized that material that in former days would have been thought to be "hard core" pornography is in fact protected by the First Amendment. *United States v. Stewart*, 336 F. Supp. 299 (D.C. Pa. 1971); *United States v. Motion Picture Entitled "Language of Love"*, 432 F. 2d 705 (2 Cir. 1970).

The Commission's research and surveys reflected that explicit sexual material similar to that referred to by Mr. Justice Stewart in *Ginzburg v. United States*, 383 U.S. at 499, n.3, has social value to those persons who might wish to obtain such material. After being questioned extensively about a range of verbal and graphic sexual materials, including nudity with genitals exposed, heterosexual intercourse, mouth-sex organ contact, homosexual activity, and sado-masochistic materials with whips and belts, persons were asked about the effects of such materials. Sixty-one percent of the respondents said that such materials "provide information about sex" and over half of these persons had either experienced this effect themselves or seen it in someone they knew personally; 47% of the respondents said that such materials improve sex relations of some married couples and about half of these persons had either experienced this effect themselves or seen it in someone they knew personally; and substantial numbers of respondents pointed to other socially important effects of such materials. See Commission Report at pp. 157-160, 356-357.

The Commission Report also reveals that the sale of sexually explicit material to consenting adults is not patently offensive to contemporary standards. Scientific surveys and research conducted by the Commission revealed that a majority of American adults (almost 60%) believe that adults should be allowed to read or see any explicit sexual materials they want to, including "materials often referred to as 'hard core pornography', that is, pictures mainly for the purpose of seeing sex organs, pictures of men and women having (or appearing to have) sexual intercourse, pictures of mouth-sex organ contact between men and women, pictures of

homosexual activities and sex activities including whips, belts or spankings. . . ." (Commission Report, 352). Most adults had voluntarily exposed themselves to such material without harmful effects and, for the most part, were not offended by such exposure (Commission Report, 51-56).

Finally, the Commission's surveys and research strongly indicate that a person who voluntarily purchases sexually explicit material does not have his "prurient interest" aroused, although he may have his sexual interests aroused (Commission Report, 23-27, 139-243). The principal finding of the Commission's research and surveys is that people do not agree about whether or not a given sexual stimulus is "sexually arousing," "morbid," or "pornographic" (Commission Report, 355). Another important finding of these studies was that groups with different demographic characteristics differ in their judgments of explicit sexual materials. Middle-class men differ from working-class men; males differ from females; sexually experienced differ from sexually inexperienced; persons with more feelings of guilt about sex differ from those with less guilt feelings; members of religious organizations, social service organizations, professional organizations and student groups differ from each other (Commission Report, 356). The Commission also found that sexual arousal and offensiveness are independent dimensions. A sexually explicit depiction that tends to be sexually arousing may or may not be offensive; and sexual material that tends to be offensive may or may not be sexually arousing (Commission Report, 356).

The empirical evidence, accumulated by the Commission, strongly indicates, if it does not conclusively prove, that sales of sexually explicit material, under circum-

stances such as occurred in the case at bar, are not patently offensive, do not appeal to prurient interest, are not utterly without redeeming social value, and are not obscene.

C. This Court has recognized that explicit sexual material may have significant value. In *Stanley v. Georgia*, 394 U.S. 557, Justice Marshall spoke of the emotional and intellectual needs satisfied by such material. In *United States v. Reidel*, 402 U.S. 351, Justice Harlan spoke of them as "memorabilia of a man's thoughts and dreams". These thoughts and dreams—"man's inner life, be it rich or sordid"—are entitled to be free from all governmental interference.

In *United States v. Dellapia*, 433 F. 2d 1252, 1258, 1259 (2 Cir. 1970), the Court said:

"The most fundamental premise of our constitutional scheme may be that every adult bears the freedom to nurture or neglect his own moral and intellectual growth. In a democracy one is free to work out one's own salvation in one's own way. If there is a justification for this premise, it is the faith—or the calculation—that to relinquish freedom of self-development would be to abandon most that is valuable about living. Government censorship of an adult's private thoughts would, as *Stanley* recognized, raise havoc with the individual's personality. . . ."

In *Karalexis v. Byrne*, 306 F. Supp. 1363 (D.C. Mass. 1969), vac. on other ground, 401 U.S. 216, the Court stated that if a "rich Stanley" was entitled to satisfy his emotional and intellectual needs by viewing sexually explicit material in his home, "a poorer Stanley should

be free to visit a protected theatre or library. We see no reason for saying he must go alone" (306 F. Supp. at 1367).

In *United States v. 31 Photographs, etc.*, 156 F. Supp. 350 (D.C. N.Y. 1957), Judge Palmieri ruled that explicit sexual material, imported from abroad by the Kinsey Institute for scientific study, was not obscene. The Department of Justice did not appeal.

The United States had filed a libel under 19 U.S.C.A. §1305, seeking the forfeiture of the photographs, books, and other articles which the Kinsey Institute sought to import into the United States. It was claimed that the material was "obscene and immoral" within the meaning of the statute. The Kinsey Institute sought the release of the material, maintaining that the attempted importation of the material did not violate the federal statute, and that if the statute was interpreted so as to prohibit the importation of the libeled material, the statute violated the Constitution. The district judge did not reach the constitutional issue, holding that the statute did not permit the exclusion of the material.

In the light of the record presented to the district judge, it was undisputed that the Institute sought to import the libeled material for the sole purpose of furthering its study of human sexual behavior as manifested in varying forms of expression and activity; and that as to those who would have access to the material, there was "no reasonable probability that it will appeal to their prurient interest". 156 F. Supp. at 353.

In the light of the aforesaid undisputed record, the district judge concluded that the issue presented to him was whether, assuming the material to be imported ap-

pealed to the prurient interest of the "average person", the material could nevertheless be deemed "obscene" if to the only persons who would have access to the material there was no reasonable probability that it would appeal to their prurient interest. The court concluded that under such circumstances the material could not be deemed obscene. In the court's opinion, the material, whose use is restricted to those in whose hands it would not have a prurient appeal, could not be judged by its appeal to the populace at large. The "closely regulated" use by the Kinsey Institute removed the material, in the opinion of the court, from the ban of the statute.

" . . . It should be obvious that obscenity must be judged by the material's appeal to somebody. For what is obscenity to one person is but a subject of scientific inquiry to another. And, of course, the substitution, required by Roth, of the 'average person' test (in cases of widespread distribution) for the test according to the effect upon one of particular susceptibility, is a matter of determining the person according to whom the appeal of the material is to be judged. Once it is admitted that the material's appeal to some person, or group of persons, must be used as the standard by which to gauge obscenity, I believe that the cases teach that, in a case such as this, the appeal to be probed is that to the people for whom, and for whom alone, the material will be available. * * *

" . . . It is probably sufficient unto this case to point out that there is no dispute in this proceeding as to the fact that there is no reasonable likelihood that the material will appeal to the prurient

interest of those who will see it. But I will add that I fail to see why it should be more difficult to determine the appeal of libelled matter to a known group of persons than it is to determine its appeal to an hypothetical 'average man.' The question is not whether the materials are necessary, or merely desirable for a particular research project. The question is not whether the fruits of the research will be valuable to society. The Tariff Act of 1930 provides no warrant for either customs officials or this court to sit in review of the decisions of scholars as to the bypaths of learning upon which they shall tread. The question is solely whether, as to those persons who will see the libelled material, there is a reasonable probability that it will appeal to their prurient interest." 156 F. Supp. at 358, 359-360.

The gist of the opinion rendered in *United States v. 31 Photographs* is that books, magazines, photographs, and other media of communication, are never inherently obscene; that material may be obscene when directed to one class of persons, but not when directed to another. Under Judge Palmieri's ruling, a holding of "obscenity" would require, first, a determination of the audience to which the material is primarily directed, and then, as a standard for judging the material, a person typical of that audience. If, therefore, material is sold or distributed to a willing and consenting adult, a person who desires the material, under controlled circumstances, then as to such person there is no probability that the appeal will be to anything more than a normal and candid interest in sex. Clearly, the average normal adult, typical of the limited audience willing and desirous of reading and viewing ex-

plicit sexual material under controlled circumstances, cannot be deemed to have a "morbid" or "shameful" interest in sex. The material, as to such adult under such circumstances, is not "obscene".

The California decisions have been moving in a similar direction. In *In re Giannini*, 69 Cal. 2d 563, 446 P. 2d 535, 72 Cal. Rptr. 655 (1968), the Supreme Court of California held that a "topless" dance performed before an audience for entertainment could not be held to violate a statute prohibiting indecent exposure and lewd or dissolute conduct, in the absence of proof that the dance was "obscene". The Court stated: "Our ruling in this case rests on the simple proposition that a dance performed before an audience for entertainment cannot be held to violate the statutory prohibitions of indecent exposure and lewd or dissolute conduct in the absence of proof that the dance, tested in the context of contemporary community standards, appealed to the prurient interest of the audience and affronted standards of decency generally accepted in the community." 72 Cal. Rptr. at 657. (Emphasis added).

In reaching the aforesaid conclusion, the California Supreme Court held, first, that the performance of a dance, like other forms of expression or communication, enjoys protection under the First Amendment unless shown to be "obscene". The prosecution had argued that standards required of an obscenity prosecution were inapplicable in the case because the conduct "standing alone" was clearly unlawful. The Court declined to so isolate the questioned conduct and held that to judge the dance "in an entirely different context would be to distort the nature of the case . . . Thus, acts which are unlawful in a different context, cir-

circumstance, or place, may be depicted or incorporated in a stage or screen presentation and come within the protection of the First Amendment, losing that protection only if found to be obscene". 72 Cal. Rptr. at 661.

Having held that the dance was entitled to constitutional protection unless deemed obscene, the Court then turned its attention to the question of whether the prosecution was bound to prove that the dance exceeded customary limits of candor under the state statute, both on the issue of prurient interest and patent offensiveness. The Court answered this question in the affirmative. "We conclude that the judgment must be vacated for lack of evidence as to whether, applying contemporary community standards, petitioner Iser's dance appealed to the prurient interest of the audience and offended accepted standards of decency." 72 Cal. Rptr. at 665 (Emphasis added).

In answer to a contention made by the prosecution that proof of community standards should not be required in cases where material was "patently obscene", the Court, in declining to so hold, stated: "In brief, this case involves a 'topless' dance shown only to adults (cf. *Ginsberg v. State of New York* (1968) 390 U.S. 629, 88 S. Ct. 1274, 20 L. Ed. 2d 195) who knew exactly what they were going to see." 72 Cal. Rptr. at 664, n.8 (Emphasis added).

In *Glancy v. County of Sacramento*, 17 Cal. App. 3d 504, 94 Cal. Rptr. 864 (1971), appeal pending in the California Supreme Court, a number of city and county ordinances which made it a misdemeanor for "topless" females and "bottomless" persons of either sex to serve food or drink to customers in certain public places, or to participate in shows there, were held

constitutionally overbroad in the absence of a requirement of obscenity of the activity.

Pointing to the ruling in *Giannini*, the appellate court held that the ordinances, as applied to topless dancing or to topless waitresses, were plainly invalid since the entertainment provided, whatever its form, was entitled to first Amendment protection unless obscene. Since the ordinances omitted any requirement of proof of obscenity, it followed that the ordinances could not be upheld under the Constitution. ". . . we cannot say that, in every public setting within the scope of the ordinance, 'topless' waitresses would be 'so patently offensive as to violate any conceivable community standard.'" 94 Cal. Rptr. at 871. The *Glancy* court emphasized that the concept of obscenity may vary, depending upon whether the visual communication is restricted "to consenting adults". The court added that entertainment cannot be held to be obscene unless, applying contemporary standards, the questioned conduct "appealed to the prurient interests of the audience". 94 Cal. Rptr. at 872. (Court's emphasis).

It had been argued by the municipalities that "topless" and "bottomless" entertainment might be conducted in a manner calculated to deliberately emphasize sexual provocation. The court replied that in the absence of contrary evidence, "it must be assumed that such publication will be addressed only to those who freely and voluntarily elect the so-called pleasure and will not be imposed upon those whose sense of propriety might be injured or their annoyance or disgust be aroused, *since they are equally free to avoid exposure*". 94 Cal. Rptr. at 873 (Court's emphasis).

"Finally, we emphasize that our decision is made upon the record before us. By this opinion,

we do not legalize all 'topless' and 'bottomless' public conduct. Nothing said herein prevents the county and city from enacting valid ordinances which adhere to the constitutional standard (U.S. Const., Amend. I). We simply hold that—contrary to the theory of these three ordinances—'topless' and 'bottomless' entertainment (including service of food or drink), of the type which the ordinances prohibit, is not obscene in *every conceivable* public setting within their scope. It undoubtedly is in some. In so holding, we follow the teaching of the *Giannini* case, *supra*, 69 Cal.2d 563, 72 Cal.Rptr.655, 446 P.2d 535, that 'live' nude entertainment cannot be characterized as obscene by isolating it from the context in which (including the viewers to whom) it is presented." 94 Cal. Rptr. at 873. (Court's emphasis).

D. *United States v. Vuitch*, 402 U.S. 62, sheds light on the question at bar. In that case, the court below dismissed an indictment charging abortion on the ground that the statute was unconstitutionally vague. The court below was of the view that the statute violated the Fifth Amendment because under it, "once an abortion was proved, a physician 'is presumed guilty and remains so unless a jury can be persuaded that his acts were necessary for the preservation of the woman's life or health' ". 402 U.S. at 68-69. This Court concluded that the court below was in error in its interpretation of the abortion statute, saying:

"... Certainly a statute that outlawed only a limited category of abortions but 'presumed' guilt whenever the mere fact of abortion was established, would at the very least present serious

constitutional problems under this Court's previous decisions interpreting the Fifth Amendment. *Tot v. United States*, 319 U.S. 463, 63 S.Ct. 1241, 87 L.Ed. 1519 (1943); *Leary v. United States*, 395 U.S. 6, 36, 89 S.Ct. 1532, 1548, 23 L.Ed.2d 57 (1969). But of course statutes should be construed whenever possible so as to uphold their constitutionality." 402 U.S. at 70.

The Court construed the statute as outlawing "only those [abortions] which are not performed under the direction of a competent, licensed physician, and those not necessary to preserve the mother's life or health", and concluded that placing the burden of proof on a doctor "would be peculiarly inconsistent with society's notions of the responsibilities of the medical profession." *Id.* at 70-71. Accordingly, the Court held that under the statute "the burden is on the prosecution to *plead and prove* that an abortion was not 'necessary for the preservation of the mother's life or health'". *Id.* at 71 (emphasis added). See *Russell v. United States*, 369 U.S. 749.

Mr. Justice White concurred, relying on *United States v. National Dairy Products Corp.*, 372 U.S. 29. In that case, the court below had dismissed a Robinson-Patman indictment on the ground that the statute was, on its face, unconstitutionally vague. This Court reversed, relying on the construction of the statute set forth in the indictment. 372 U.S. at 31. The Court concluded that the "beadsight indictment" corrected the "blunderbuss statute" by alleging that the sale "below cost" was made with "predatory intent". *Id.* at 33. *Reidel* and *37 Photographs* each dealt with the statute on its face. Here we deal with the

constitutional construction of an obscenity statute. Applying the teachings of the *Vuitch*, *Russell* and *National Dairy Products* cases, the statute herein may be applied constitutionally, only if the State alleges, in its accusatory pleading, and proves, that the sale of a challenged book patently offended contemporary standards, and appealed to prurient interest, and was utterly without redeeming social value, because the sale was not surrounded by notice to the public of the book's nature and by reasonable protection against exposure to juveniles.

It follows from all the foregoing, it is submitted, that the judgment of conviction of the petitioner herein should be reversed. In the light of the stipulated record the book cannot be deemed to be "obscene", since the sale of the book to a consenting adult under controlled circumstances is not patently offensive measured by contemporary community standards, does not reasonably appeal to the prurient interest of the consenting adult, and plainly has some value to him. The application of the state obscenity statute to the petitioner herein violates the free speech and press, due process, and equal protection provisions of the First and Fourteenth Amendments.

If, therefore, the consenting adult had the right, under the principles discussed above, to purchase the book, it is submitted that the petitioner had the right, under these particular circumstances, to sell the book to this consenting adult. Such a right existed for reasons similar to the rights which this Court held properly belonged to the Executive Director and the physician in *Griswold v. Connecticut*, 381 U.S. 479, 480-482, and the lecturer in *Eisenstadt v. Baird*, 405 U.S. 438, 92 S. Ct. 1029, 1034-1035.

III.

The Book "Suite 69" Is Expression Protected by the Free Speech and Press and Due Process Provisions of the First and Fourteenth Amendments. California Penal Code §§311 and 311.2, as Construed and Applied to Punish the Sale of Said Book by a Retail Bookseller to an Adult Who Requested and Purchased the Book, Render the State Obscenity Statutes Unconstitutional, Arbitrarily Deprive This Petitioner of His Liberty and Property Without Due Process of Law, and Abridge the Exercise by Petitioner of Freedoms of Speech and Press, All Contrary to the Free Speech and Due Process Provisions of the First and Fourteenth Amendments.

The book "Suite 69" by I. Smithson is a paperback novel containing no illustrations. The book was sold to a grown man who requested it. The book was not pandered, and concededly was not disseminated to minors nor thrust upon the general public. The frankness and candor of the book's language is no different from that found in scores of books to which this Court has afforded constitutional protection. Under any conceivable constitutional standard for judging obscenity, the book is not obscene and is entitled to constitutional protection. See, *Redrup v. New York*, 386 U.S. 767.

The book herein plainly does not exceed contemporary community standards and the limits of tolerance which the community as a whole today gives to writing about sex and sex relations. The complete frankness with which sex and sex relations are dealt with today is evident in all media of public expression, in the kind of language used and subjects discussed in every area

of society, in theatres, films, books, advertisements, dress, and in many other ways familiar to the community. The book satisfies the normal curiosity about and interest in sex which all adults presumably have; it does not appeal to a shameful or morbid interest in sex. Moreover, the uncontroverted evidence in the record establishes that the book has social importance [A. 302-304].

In *Roth v. United States*, 354 U.S. 476, this Court emphasized that "sex and obscenity are not synonymous" (354 U.S. at 487), and the decisions of this Court since *Roth* have time and again afforded constitutional protection to novels graphically describing all forms of sexual activity. No reasoned distinction can be drawn between the book herein and other books which this Court has found protected under any constitutional standard. See, *Childs v. Oregon*, 401 U.S. 1006 ("Lesbian Roommate"); *Walker v. Ohio*, 398 U.S. 434 ("Lurid Sinner," "Sin Crop," "Sands of Shame"); *Hoyt v. Minnesota*, 399 U.S. 524 ("The Way of a Man With a Maid," "Adam and Eve," "Business as Usual," "Lady Susan's Cruel Lover," "True Love Stories of Growing Up"); *Quantity of Copies of Books v. Kansas*, 378 U.S. 205 ("Sin Hooked," "Bayou Sinners," "Lust Hungry," "Shame Shop," "Fleshpot," "Sinners Seance," "Passion Priestess," "Penthouse Pagans," "Shame Market," "Sin Warden," "Flesh Avenger"); *Aday v. United States*, 388 U.S. 447 ("Sex Life of a Cop"); *Books, Inc. v. United States*, 388 U.S. 449 ("Lust Job"); *Corinth Publications, Inc.*

v. Wesberry, 388 U.S. 448 ("Sin Whisper"); *Keney v. New York*, 388 U.S. 440 ("Sin Servant," "Lust School," "Lust Web"); *Mazes v. Ohio*, 388 U.S. 453 ("Orgy Club"); *Friedman v. New York*, 388 U.S. 441 ("Bondage Boarding School," "English Spanking School," "Bound and Spanked," "Sweeter Gwen," "Traveling Saleslady Gets Spanked," "Bound to Please," "Bizarre Summer Rivalry," "Heatwave," "Escape into Bondage"); *Sheperd v. New York*, 388 U.S. 444 ("Promenade Bondage," "Spanking Nurses," "Spanking Sisters," "Bondage"); *Avansino v. New York*, 388 U.S. 446 ("Promenade Bondage, Vol. 4"); *Redup v. New York*, 386 U.S. 767 ("Lust Pool," "Shame Agent"); *Memoirs v. Massachusetts*, 383 U.S. 413 ("Fanny Hill"); *Grove Press, Inc. v. Gerstein*, 378 U.S. 577 ("Tropic of Cancer"); *Tralins v. Gerstein*, 378 U.S. 576 ("Pleasure Was My Business"). See also, *Grove Press, Inc. v. Christenberry*, 276 F.2d 433 (2 Cir. 1960), affg. 175 F. Supp. 488 (D.C. N.Y. 1959) ("Lady Chatterley's Lover"); *Haldeman v. United States*, 340 F. 2d 59 (10 Cir. 1965); *Grant v. United States*, 380 F. 2d 748 (9 Cir. 1967); *Luros v. United States*, 389 F. 2d 200 (8 Cir. 1968) ("Lesbian Sin Song," "Two Women in Love," "Pleasure House," "Lesbian Alley," "The Three Way Apartment," "The Affairs of Gloria").

Thus, in the light of the requirements of the First and Fourteenth Amendments and the interpretive decisions of this Court with respect to books indistinguishable in content from the book here involved, it is submitted that the judgment of conviction here, imposing fine and imprisonment upon petitioner, cannot stand consistent with the guarantees of the fundamental law.

IV.

California Penal Code §§311 and 311.2, as Construed and Applied to Authorize the Judgment of Conviction Herein Without Any Evidence in the Record in Support of an Essential Element of the Offense, to Wit, That the Book Was Utterly Without Redeeming Social Importance, and Where the Only Uncontroverted Evidence Offered by Petitioner Established by Expert Testimony That the Book Had Social Importance, Deprive Petitioner of His Liberty and Property Without Due Process of Law and Abridge Petitioner's Exercise of Freedoms of Speech and Press, Contrary to the Free Speech and Press and Due Process Provisions of the First and Fourteenth Amendments.

The record is barren of any evidence to establish that the book herein is utterly without redeeming social importance. The only evidence in the record, uncontroverted, is that the book does have social importance [A. 302-304]. The conviction of petitioner, therefore, for a violation of the state obscenity statutes rests upon a record devoid of evidence to support petitioner's alleged guilt and constitutes, it is submitted, a plain denial of due process.

A. In any criminal prosecution, "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364. Where the "transcendent value of speech" is involved, due process requires "that the State bear the burden of persuasion to show that the [accused] engaged in criminal speech." *Speiser v. Randall*, 357 U.S. 513, 526. In *Memoirs v. Massachusetts*, 383 U.S. 413, this

Court emphasized the importance of the "three federal constitutional criteria" for judging the alleged obscenity of material (383 U.S. at 419). With respect to the *Roth* definition, the Court also stressed the following: "Under this definition, as elaborated in subsequent cases, three elements must coalesce: '*It must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.*'" (383 U.S. at 418) (Emphasis added).

It follows from the aforesaid principles that an essential element of the offense of obscenity demanded by the Constitution is evidence that the material involved is utterly without redeeming social importance. It follows also that the prosecution in all such cases is constitutionally required to plead and prove all the essential elements of the offense beyond a reasonable doubt.

B. The state obscenity statutes have been construed by the court below to shift the burden of producing evidence on the element of social value to the defendant, once the prosecution in an obscenity case produces evidence that the material appeals to prurient interest and exceeds the customary limits of candor. [See, A. 3]. Such construction renders the state statutes unconstitutional. The effect of such construction is the judicial creation of a presumption that material which appeals to prurient interest and exceeds customary limits of candor is therefore utterly without redeeming social importance. This irrational presumption cannot be squared with the decision of this Court in *Memoirs v. Massachusetts*, 383 U.S. 413. This con-

struction creates an irrational presumption between the facts proved and the fact presumed, and undermines the presumption of innocence which accompanies the accused and which extends to every element of the crime. See, *Leary v. United States*, 395 U.S. 6; *Tot v. United States*, 319 U.S. 463. Thus, for example, in *United States v. Vuitch*, 402 U.S. 62, this Court interpreted a law which prohibited abortion unless "necessary for the preservation of the mother's life or health" to require that the burden be upon the prosecution to plead and prove that abortion was not necessary for such purposes. The statute was so construed because:

"Certainly a statute that outlawed only a limited category of abortions but 'presumed' guilt whenever the mere fact of abortion was established, would at the very least present serious constitutional problems under this Court's previous decisions interpreting the Fifth Amendment. *Tot v. United States* [citation omitted]; *Leary v. United States* [citation omitted]." (402 U.S. at 70).

Moreover, the prosecution's burden cannot be met, it is submitted, by simply placing the challenged material into evidence, leaving it to the judge or jury to determine, without further evidence, whether the material is utterly without redeeming social importance. It cannot be assumed that triers of the facts are necessarily familiar with what has literary, artistic, historical, psychological, educational, entertaining, or other social value and importance. Indeed, in the years since this Court decided *Roth v. United States*, 354 U.S. 476, the principle that emerges most clearly from the decisions of this Court is that "obscenity" is not self-evident [See cases cited in Point II, *supra*]. This Court has time and time again reversed judgments of conviction and judgments *in rem* where the triers of

fact have held that the material is nothing but "hard core pornography," "dirt for dirt's sake," "unadulterated filth" and other similarly perjorative terms. To permit convictions without evidence on each of the essential elements of the offense is simply to encourage the proliferation of mistaken fact-finding by courts and juries.

The mere reading of a book cannot, standing alone, demonstrate that it is utterly without redeeming social importance. The question is not how the challenged material strikes the average judge or juror, but whether the material "has literary or scientific or artistic value or any other form of social importance." (*Jacobellis v. Ohio*, 378 U.S. 184, 191). Whether material is "utterly" without social importance, "utterly" worthless, (*Memoirs v. Massachusetts*, 383 U.S. 413) can only be answered by witnesses who have expertise in wide areas of the social disciplines which the average jury or judge cannot be expected to have. Of course, each individual has his own standards of taste, but if law has any meaning at all, it is that decisions shall not be made unilaterally by the subjective predilections of individuals, but by objective standards supported by evidence justifying the findings made under the guidance of such standards.

To permit triers of fact in obscenity cases to presume or infer from the mere reading of material dealing with sex that it is utterly without redeeming social importance, is to open the door wide to suppression of material which is not obscene. Such a procedure en-

courages reliance upon the arbitrary subjective reactions of the trier of fact to material which it finds distasteful, and a book which the trier of fact finds particularly distasteful to himself will inevitably lead him to presume that it is utterly worthless. Protection for non-obscene material can only be assured if the burden is placed upon the prosecution to prove by sufficient evidence* that all of the essential elements of obscenity are present in any particular case.

The proposition that writings and other forms of expression may not simply be presumed to be utterly without redeeming social value in the absence of evidence is empirically supported by the Report of the Commission on Obscenity and Pornography recently submitted to the Congress of the United States (Govt. Printing Office, September, 1970). After an extensive and detailed investigation of two years, the research conducted by the Commission led to several conclusions which bear directly upon the issue of the social value of material dealing with sex. First, the Commission found that "Extensive empirical investigation, both by the Commission and by others, provides no evidence that exposure to or use of explicit sexual materials plays a significant role in the causation of social or individual harms, such as crime, delinquency, sexual or non-sexual deviancy, or severe emotional disturbances." [Report, p. 52]. Second, the Commission found that "On the positive side, explicit sexual materials are sought as a source of entertainment and information by substantial numbers of American adults. At times,

these materials also appear to serve to increase and facilitate constructive communication about sexual matters within marriage." [Report, p. 53]. Thus the presumption created by the court below not only violates the constitutional principles previously discussed, but runs counter to the weight of available scientific knowledge.

C. From all of the foregoing, it is submitted that the construction of the state obscenity statutes by the court below shifting the burden of producing evidence on the element of social value to the Defendant is inconsistent with the freedoms of speech and press and with due process of law. Even aside from the constitutional infirmities of such construction, petitioner's conviction is void on the Appellate Department's own terms. Petitioner did produce evidence by way of expert testimony that the book in question possessed social importance [A. 302-304]. In a previous decision, the court below had held that where the defendant in an obscenity prosecution does go forward with evidence that the material has social value, the prosecution, having the burden of persuasion, must produce evidence to prove that the material utterly lacks the social value claimed for it. *People v. Holden*, Appellate Department of the Superior Court for the County of Los Angeles, State of California, No. CR A 10754, unreported (1972). The court below reiterated this construction of the statutes in its opinion in the present case [App. Pet. A. 3-4]. As the court below has construed the state statutes, once the defendant has produced

evidence of social value, the prosecution may not rest upon the mere introduction into evidence of the challenged material itself. Thus, the court below was required to reverse petitioner's conviction under its own prior construction of the state obscenity statutes since the prosecution produced no evidence other than the material itself to prove its asserted lack of social value while petitioner did adduce testimony to prove that the book possessed social importance. Notwithstanding the total failure of proof by the prosecution on the element of social value, the court below affirmed petitioner's conviction by holding that alleged evidence of "pandering" supplied the otherwise absent element of the prosecution's case [App. Pet. A. 4-8]. As will be discussed in detail in the next portion of this Brief, the concept of "pandering" has no basis in fact or in law in the case herein, and cannot in any event be constitutionally applied to petitioner.

The effect of the ruling of the Appellate Department is to permit a judgment of conviction in an obscenity prosecution without the slightest proof, directly or indirectly, to establish an essential element of the offense, to wit, the utter lack of social value of the material. Conviction of a crime without any evidence in the record to support the accused's guilt not only constitutes a denial of due process, but an abridgement of the exercise of freedoms of speech and press protected by the First and Fourteenth Amendments. *Garner v. Louisiana*, 368 U.S. 157, 173-174; *Thompson v. City of Louisville*, 362 U.S. 199, 204-206.

V.

California Penal Code §§311 and 311.2, as Construed and Applied to Authorize the Judgment of Conviction of Petitioner Herein Upon the Theory That Proof of "Pandering" May Serve as a Substitute for Proof by the Prosecution That the Book Is Utterly Without Redeeming Social Importance, Where No Charge of "Pandering" Was Ever Made in the Complaint nor Ever Proved, Where the Case Was Never Tried Upon Such a Theory and the Jury Was Never Instructed Upon Such an Issue, Where the Prosecution Itself Conceded That the Doctrine of "Pandering" Could Not Be Invoked to Affirm the Conviction, and Where State Statutes Which Became Effective Long After the Commission of the Alleged Offense Were Retroactively Applied to Punish the Alleged Conduct of Pandering," When Such Conduct Was Not Punishable Under the Laws of the State at the Time of the Commission of the Alleged Offense, and the Highest Court of the State Had Ruled That Evidence of Such Conduct Could Not Be Used to Support a Conviction Under the General Obscenity Statute, Arbitrarily and Capriciously Deprive Petitioner of His Liberty and Property Without Due Process of Law, Deny Petitioner the Equal Protection of the Laws, and Abridge Petitioner's Exercise of Freedoms of Speech and Press, Contrary to the Free Speech and Press, Due Process, and Equal Protection Provisions of the First and Fourteenth Amendments.

As developed in the previous portion of this Brief, the Appellate Department had construed the state obscenity statutes to require the prosecution to produce evidence that challenged material is utterly without

social value, aside from the material itself, once the defendant has produced some evidence that the material possesses social importance. See, *People v. Newton*, 9 Cal. App. 3d Supp. 24, 88 Cal. Rptr. 343; *People v. Holden*, Appellate Department of the Superior Court for the County of Los Angeles, State of California, No. CR A 10754, unreported (1972); App. Pet. A, pp. 3-4. Since petitioner did adduce such evidence of the book's social value, and the prosecution presented no evidence of the book's social value, and the prosecution presented no evidence on this issue, the court below was required to reverse petitioner's conviction on the basis of its own construction of the statutes. Instead, the Appellate Department upheld petitioner's conviction by devising a concept of "pandering" to serve as a substitute for proof by the prosecution that the book is utterly without redeeming social importance; such concept of "pandering" has no basis in fact or in law in the present case and results in the deprivation of petitioner's constitutional rights.

A. We deal here with the state's general obscenity statute which, at the time of the commission of the alleged offense herein, prohibited the knowing sale of "any obscene matter" (California Penal Code §311.2). The statute defined "obscene" using the tripartite definition of *Memoirs v. Massachusetts*, 383 U.S. 413 (California Penal Code §311(a)). The statute under which petitioner was prosecuted made no mention that the "context" of the sale or the "conduct" of the accused "was an element of the offense somehow modifying the word 'obscene.'" (*Rabe v. Washington*, 405 U.S. 13, 92 S. Ct. 993, 994). Nor was any charge of "pandering" ever made in the Complaint herein. In the first instance,

therefore, petitioner's conviction was affirmed on the basis of a charge never made. This Court has emphasized again and again that "Conviction upon a charge not made would be sheer denial of due process." *DeJonge v. Oregon*, 299 U.S. 353, 362. See, *Garner v. Louisiana*, 368 U.S. 157, 164.

Secondly, the present case was never tried upon any theory of "pandering," the jury was never instructed upon such an issue, and the prosecution itself conceded before the Appellate Department that the doctrine of pandering could not constitutionally be invoked to affirm petitioner's conviction. In the prosecution's Brief on rehearing before the Appellate Department, it was admitted that the prosecution "did not argue this concept at trial and/or on appeal" [A. 481]. The prosecution further conceded that "The case herein will have to be decided on the book per se, plus the evidence pertaining to scienter" [A. 482], and "Respondent believes the Court would be bound by *People v. Rosakos* (1968), 263 C.A.2d 497, 500, where that Court said that 'The seller's statement certainly cannot make that which is not obscene, obscene.'" [A. 482]. Plainly, this is not a case in which "the prosecution charged the offense in the context of the circumstances of production, sale, and publicity and assumed that, standing alone, the publications themselves might not be obscene." (*Ginzburg v. United States*, 383 U.S. 463, 465). This Court has frequently held that conviction of a charge on which an accused was never tried is as much as a violation of due process as it is to convict him upon a charge that was never made. *Coffe v. Arkansas*, 333 U.S. 196, 201. Thus, in *Rabe v. Washington*, 405 U.S. 13, the Court reversed a judgment of conviction based upon the state's general obscenity stat-

ute, where the state court construed its statute to punish the defendant for exhibiting a film in a drive-in theatre where passersby might be offended, but conceded that defendant might exhibit the film to adults in an indoor theatre with impunity. The Court held that "The statute, so construed, is impermissibly vague as applied to petitioner because of its failure to give him fair notice that criminal liability is dependent upon the place where the film is shown." (92 S. Ct. at 994).

The affirmance of petitioner's conviction on the basis of alleged "pandering" thus cannot be sustained "consistent with the fundamental notice requirements of the Due Process Clause." (*Rabe v. Washington*, Burger, C. J. concurring, 92 S. Ct. at 995).

B. In its initial decision affirming petitioner's conviction on the basis of alleged "pandering," the Appellate Department relied upon an amendment to the state obscenity statutes, California Penal Code §311(a)(2), which became effective November 10, 1969, some six months after the commission of the alleged offense herein, which provides that in obscenity prosecutions, where the circumstances of production, purchase, sale, dissemination, distribution or publicity indicated that matter is "being commercially exploited by the defendant for the sake of its prurient appeal," such evidence is probative with respect to the nature of the matter and can "justify the conclusion that the matter is utterly without redeeming social importance" (App. Pet. B, pp. 12-14). The Appellate Department granted rehearing to determine whether the amendment could be constitutionally applied in a case where the alleged offense occurred before the effective date of the legislation (App. Pet. D). Following rehearing, and notwithstanding the prosecution's concession, the Appellate Department

ruled that the concept of pandering enunciated by this Court in *Ginzburg v. United States*, 383 U.S. 463, and reiterated in *Memoirs v. Massachusetts*, 383 U.S. 413—the concept subsequently embodied in California Penal Code §311(a)(2)—must always have been deemed to be the law in California; that the statute enacted after the commission of the alleged offense herein merely codified such pre-existing law; and that therefore the retroactive application of the statutes did not deprive Petitioner of his liberty without due process of law nor his right to a jury trial, did not subject him to any *ex post facto* application of the laws nor subject petitioner to the deprivation of his liberty on a charge never made and a theory never tried (App. Pet. A 4-8).

Without conceding the validity of the state “pandering” statute which became effective long after the commission of the alleged offense by petitioner, it is plain that the attempt to apply such statute to petitioner in order to support the conviction here runs counter to fundamental principles embodied in the Constitution. Some two years before the enactment of the “pandering” statute, the highest state court had held that the doctrine of pandering could not be invoked where no such charge was contained in the accusation and where the state legislature had created no such crime. *People v. Noroff*, 67 Cal. 2d 791, 433 P.2d 479, 63 Cal. Rptr. 575. In that case, the California Supreme Court made it crystal clear that the concept of pandering as enunciated in *Ginzburg v. United States*, 383 U.S. 463, and *Memoirs v. Massachusetts*, 383 U.S. 413, was not encompassed by the state obscenity statutes in force at that time—the same statutes in force at the time of the commission of the alleged offense by petitioner.

The Appellate Department sought to distinguish *Noroff* on the ground that *Noroff* merely held that where appeal to prurient interest was lacking, pandering could not supply the deficiency, but that evidence of pandering could justify the conclusion that material is utterly without redeeming social importance [App. Pet. A. 5-7]. Such attempt to distinguish the authoritative ruling in *Noroff* is wholly without merit. Here, as in *Noroff*, "The People initially charged that [the book] was obscene on its face" (63 Cal. Rptr. at 576). Here, as in *Noroff*, "unlike Ginzburg . . . , this is not a case in which 'the prosecution charged the offense in the context of the circumstances of production, sale and publicity and assumed that, standing alone, the publications themselves might be obscene.'" (63 Cal. Rptr. at 576). Here, as in *Noroff*, "the prosecution expressly recognized that the only issue relevant to its charge was the obscenity of the [book] per se." (63 Cal. Rptr. at 576).

The California Supreme Court held in *Noroff* that:

"We cannot accept the People's argument, advanced for the first time on appeal, that the trial court should have permitted the prosecution to go to the jury bearing upon the defendants' 'pandering' of the magazine in question. First, the indictment did not charge the defendants with pandering; second, the State Legislature has created no such crime. Insofar as dictum in *Landau v. Ford* (1966) 245 C.A. 2d 820, 824, 830, 54 Cal. Rptr. 177 . . . suggests a contrary reading of the statutes, it is hereby disapproved." (63 Cal. Rptr. at 576).

Thus the California Supreme Court disapproved, as an impermissible construction of the state obscenity statutes then in force, the statement in *Landau v. Ford*

ing, 245 Cal. App. 2d 820, 54 Cal. Rptr. 177 (1966), that "evidence that material was commercially exploited for the sake of prurient appeal to the exclusion of all other values would justify the conclusion that the material was utterly without redeeming social importance." (54 Cal. Rptr. at 179). It follows that the Appellate Department's attempt to distinguish *Noroff* is completely inconsistent with what the California Supreme Court actually held in that case, as the prosecution indeed conceded [A. 481-483].

It has long been held that a statute, on its face and as construed and applied, comes within the constitutional prohibition of *ex post facto* laws when, by its necessary operation and "in its relation to the offense, or its consequences, alters the situation of the accused, to his disadvantage." *Thompson v. Utah*, 170 U.S. 343. Indeed, "an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Article I, §10, of the Constitution forbids." *Bouie v. City of Columbia*, 378 U.S. 347, 353. What the court below has held is that petitioner could be convicted on the basis of alleged conduct which concededly was not proscribed at the time of the commission of the alleged offense, and which the highest court of the State had held could not be used to support a conviction under the general obscenity statute. At the time of the commission of the alleged offense, the petitioner here had "no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial construction." *Bouie v. City of Columbia*, 378 U.S. at 352.

C. Finally, wholly apart from the fact that no charge of "pandering" was ever made or tried before

the jury, and aside from the retrospective action of the court below which violates fundamental principles of due process and guarantees against *ex post facto* laws, there was no proof of "pandering" in the case herein. Petitioner's statement to the police officer at the time of purchase, that he had "sexy" books, and the advertisements in the back of the book, taken separately or together, could hardly be deemed sufficient to support a finding of "pandering" as this Court has interpreted the concept. See, *Redrup v. New York*, 386 U.S. 767; *Aday v. United States*, 388 U.S. 447, reversing *sub nom. United States v. West Coast News Co.*, 357 F. 2d 855 (6 Cir. 1966); *Books, Inc. v. United States*, 388 U.S. 449, reversing 358 F. 2d 935 (1 Cir. 1966); *Childs v. Oregon*, 401 U.S. 1006; *Bloss v. Dykema*, 398 U.S. 278; *Walker v. Ohio*, 398 U.S. 524; *Central Magazine Sales, Ltd. v. United States*, 389 U.S. 50; *Potomac News Co. v. United States*, 389 U.S. 47. See also, *United States v. Baranov*, 418 F. 2d 1051, 1053-1054 (9 Cir. 1969); *Spinar and Germain v. United States*, 440 F. 2d 1241 (8 Cir. 1971); *Luros v. United States*, 389 F. 2d 200 (8 Cir. 1968).

Petitioner in the present case no more "pandered" the book in question than did the petitioner in *Childs v. Oregon*, 401 U.S. 1006, in which this Court reversed a state obscenity conviction based upon sale of the book "Lesbian Roommate," in a *per curiam* opinion citing *Redrup v. New York*, 386 U.S. 767. In *Childs*, the Court of Appeals for the Ninth Circuit (431 F. 2d 272) was of the opinion that the conviction was supported by substantial evidence of pandering. The Court of Appeals pointed to sensational drawings and quotations appearing on the front and back covers of the book in question and, as in the present case, to

advertising in the back of the book, and, again as in this case, to a conversation had between the defendant and the police officer who purchased the book.⁵ Notwithstanding such claimed evidence of pandering, this Court reversed the conviction, as aforesaid.

The alleged evidence of pandering in the present case is virtually identical to that in *Childs v. Oregon*, 401 U.S. 1006, which this Court deemed insufficient to support a conviction for sale of a novel like that in the present case to a police officer. Here, as in *Childs*, it was the police officer who initiated the discussion by specifically requesting "good sexy books" and "real good ones" [A. 54]. Here, as in *Childs*, the court below thought that advertising at the end of the book itself constituted pandering. It is plain that none of this evidence constitutes the sort of pandering identified by this Court in *Ginzburg v. United States*, 383 U.S. 463. Application of the doctrine of pandering to the facts of the present case would afford to that doctrine a broad reach never intended by this Court, and surely subversive of freedoms of speech and press and due process of law.

⁵This conversation was described by the Court of Appeals in *Childs* as follows:

"When Officer Prunk went to the defendant's store to investigate he asked the defendant where the defendant kept the 'dirtier books' (R.T. 243). The defendant identified a particular rack where they were kept and volunteered that the 'worst ones' were obtained from out-of-town and kept in this group. (R.T. 244). There is also evidence of pandering by the 'originator' (See, *Ginzburg*, 383 U.S. at 467, 86 S.Ct. 942). The advertising material inside the back cover leaves no doubt as to the market to which the book is directed." (431 F. 2d at 277, n. 7).

VI.

California Penal Code §§311 and 311.2, as Construed and Applied to Authorize the Judgment of Conviction Herein, Where the Standard for Judging the Alleged Obscenity of the Book Was Based Upon the Community Standards of the State, and Not Upon the Standards of the Nation as a Whole, Deprive Petitioner of His Liberty and Property Without Due Process of Law and Abridge Petitioner's Exercise of Freedoms of Speech and Press, Contrary to the Free Speech and Press and Due Process Provisions of the First and Fourteenth Amendments.

The trial court instructed the jury to judge the alleged obscenity of the book herein solely on the basis of the contemporary community standards of the State of California [A. 445]. The Appellate Department approved the trial court's use of state standards, declining to follow the ruling of the Court in *Jacobellis v. Ohio*, 378 U.S. 184. The court below held, in effect, that there is greater latitude for state action under the word "liberty" under the Fourteenth Amendment than is allowed to Congress by the language of the First Amendment. The adoption of the community standards of a state, as opposed to the standards of the Nation as a whole, can only result in deterring expression and undermining the guarantees contained in the First Amendment, subsumed into the Due Process Clause of the Fourteenth Amendment as a limitation upon state action.

All obscenity cases implicate First Amendment questions. The suppression of any particular expression "raises an individual constitutional problem, in which a reviewing court must determine for *itself* whether the attacked expression is suppressible within consti-

tutional standards.” (Justice Harlan in *Roth v. United States*, 354 U.S. 478, 497). Since the fundamental freedoms of speech and press are indispensable to the continuing growth of a free society, “ceaseless vigilance is the watchword to prevent their erosion by Congress or by the states. . . .” (Justice Brennan in *Roth v. United States*, 354 U.S. at 488).

The classification of obscenity as “non-speech” and therefore subject to state regulation, does not support the position of the court below. “The existence of the State’s power to prevent the distribution of obscene matter does not mean that there can be no constitutional barrier to any form of practical exercise of that power.” *Smith v. California*, 361 U.S. 147, 155. The power to suppress obscenity is limited by the constitutional protection for free expression. See, *Marcus v. Search Warrants of Property*, 367 U.S. 717; *Freedman v. Maryland*, 380 U.S. 51. “Since it is only ‘obscenity’ that is excluded from the constitutional protection, the question of whether a particular work is obscene necessarily implicates an issue of constitutional law . . . such an issue, we think, must ultimately be decided by this Court.” *Jacobellis v. Ohio*, 378 U.S. at 187-188.

First Amendment scrutiny is involved in every obscenity case because each decision in an obscenity proceeding means either that the particular communication will enter into the “thinking process of the community,” or it will be suppressed. The decisions of this Court leave no doubt that the values to the individual and to society of freedom of expression are of singular importance to a free society. “The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.” *Roth v. United States*, 354 U.S. at 484.

Unless the tightest reins are placed upon the power of the states to regulate obscenity, the "marketplace of ideas" will be gravely threatened. The notion that such State is free to define "obscenity" as it desires has been rejected. In *Roth*, Justice Brennan writing for the majority of the Court, stated:

"[W]e rejected, in this case, the argument that there is greater latitude for state action under the word 'liberty' under the Fourteenth Amendment than is allowed to Congress by the language of the First Amendment." 354 U.S. at 492, n. 31.

In *Jacobellis v. Ohio*, 378 U.S. 184, in holding that the motion picture film there involved was not obscene and entitled to constitutional protection, Justice Brennan referred again to the requirement of ascertaining the "dim and uncertain line" that often separates obscenity from constitutionally protected expression. It was stated: "It is too late in the day to argue that the location of the line is different, and the task of ascertaining it easier, when a state rather than a federal obscenity law is involved. The view that the constitutional guarantees of free expression do not apply as fully to the states as they do to the federal government was rejected in *Roth-Alberts*, *supra*, where the Court's single opinion applied the same standards to both a state and a federal conviction." 378 U.S. at 187, n. 2. Hence, the principle was reaffirmed that in "obscenity" cases, as in all others involving rights derived from the First Amendment guarantees of free expression, the Court "cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected." 378 U.S. at 190.

A rule which permits the states to "experiment" on the basis of their own "community standards" would

eliminate independent judicial review based on federal constitutional standards. Such a "watered down version of constitutional rights" (*Garrity v. New Jersey*, 385 U.S. 493, 500) would reverse the process of absorption of the specific freedoms of the first ten amendments into the "liberty" guaranteed against state infringement by the Fourteenth Amendment. See, for example, *Gitlow v. New York*, 268 U.S. 652, 666; *Pennkamp v. Florida*, 328 U.S. 331, 335; *Gideon v. Wainwright*, 372 U.S. 335, 340-342; *Benton v. Maryland*, 395 U.S. 784, 793-796; *Malloy v. Hogan*, 378 U.S. 1, 4-11.

The dangers of permitting each State to set its own standards of acceptability of expression are manifest. The unevenness of censorship permitted by a multiplicity of state standards would inevitably chill the dissemination of protected expression. Publishers and producers of books, magazines, films and other media of communication cannot be expected to print or create separate editions of books or prints of film to satisfy police officers, prosecuting officials, censorship boards and private censorial groups in each of the 50 states. Ultimately, each separate "community" would censor expression for the entire country. Thus, the statement in *Jacobellis v. Ohio*, 378 U.S. 184, with respect to the requirement of a national standard, reaffirms a principle essential to the maintenance and operation of our constitutional system.

"... Communities vary, however, in many respects other than their toleration of alleged obscenity, and such variances have never been considered to require or justify a varying standard for application of the Federal Constitution. The Court has regularly been compelled, in reviewing criminal convictions challenged under the Due

Process Clause of the Fourteenth Amendment, to reconcile the conflicting rights of the local community which brought the prosecution and of the individual defendant. Such a task is admittedly difficult and delicate, but it is inherent in the Court's duty of determining whether a particular conviction worked a deprivation of rights guaranteed by the Federal Constitution. The Court has not shrunk from discharging that duty in other areas, and we see no reason why it should do so here. The Court has explicitly refused to tolerate a result whereby 'the constitutional limits of free expression in the Nation would vary with state lines,' *Pennekamp v. Florida*, supra, 328 U.S., at 335, 66 S.Ct., at 1031, we see even less justification for allowing such limits to vary with town or county lines. We thus reaffirm the position taken in *Roth* to the effect that the constitutional status of an alleged obscene work must be determined on the basis of a national standard. It is, after all, a national Constitution we are expounding." 378 U.S. at 194-195.

In addition to the aforesaid, Petitioner here adopts the argument made by the American Civil Liberties Union of Southern California and the American Civil Liberties Union, *amici curiae*, in *Miller v. California*, No. 70-73.

Conclusion.

For the foregoing reasons, the judgment herein should be reversed.

Respectfully submitted,

STANLEY FLEISHMAN,

DAVID M. BROWN,

Counsel for Petitioner.

SAM ROSENWEIN,
Of Counsel.

FILE COPY

Supreme Court, U. S.
FILED

SEP 29 1972

MICHAEL BODAN, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-1422

MURRAY KAPLAN,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

BRIEF FOR RESPONDENT

ROGER ARNEBERGH
City Attorney

DAVID M. SCHACTER
Chief of the
Appellate Department

WARD GLEN McCONNELL
Deputy City Attorney

Room 500
205 South Broadway
Los Angeles, Ca. 90012
(213) 485-5483

Attorneys for Respondent

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1971

No. 71-1422

MURRAY KAPLAN,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

BRIEF FOR RESPONDENT

ROGER ARNEBERGH
City Attorney

DAVID M. SCHACTER
Chief of the
Appellate Department

WARD GLEN McCONNELL
Deputy City Attorney

Room 500
205 South Broadway
Los Angeles, Ca. 90012
(213) 485-5483

Attorneys for Respondent

TOPICAL INDEX

	<u>Page</u>
Table of Authorities	iii
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	3
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	7
STATEMENT	11
SUMMARY OF ARGUMENT	20
I CALIFORNIA PENAL CODE §§ 311 AND 311.2, AS CONSTRUED AND APPLIED TO AUTHORIZE THE JUDG- MENT OF CONVICTION OF PETITIONER HEREIN, FOR SELLING AN ADMITTEDLY OBSCENE BOOK TO AN ADULT, DOES NOT DEPRIVE PETITIONER OF HIS LIBERTY AND PROPERTY WITHOUT DUE PROCESS OF LAW AND DOES NOT ABRIDGE PETITIONER'S EXERCISE OF FREEDOMS OF SPEECH AND PRESS	25
II OBSCENE MATTER IS NO LESS OBSCENE MERELY BECAUSE IT IS SOLD TO AN ADULT INSTEAD OF A CHILD, OR FORCED ON AN UNWILLING ADULT, AND STATE REGULATION IS PROPER AND NECESSARY	28
III THE BOOK SUITE 69 IS OBSCENE AND IS NOT PROTECTED BY THE FREE SPEECH AND PRESS AND DUE PROCESS PROVISIONS OF THE FIRST AND FOURTEENTH AMENDMENTS	38

IV CALIFORNIA PENAL CODE §§ 311 AND 311.2, CONSTRUED AND APPLIED TO ALLOW THE PROSECUTION TO PROVE THAT MATTER IS UTTERLY WITHOUT REDEEMING SOCIAL IMPORTANCE BY PROVING THAT IT WAS COMMERCIALY EXPLOITED FOR THE SAKE OF ITS PRURIENT APPEAL, TO THE EXCLUSION OF ALL OTHER VALUES, DOES NOT DEPRIVE PETITIONER OF HIS LIABILITY AND PROPERTY WITHOUT DUE PROCESS OF LAW, AND DOES NOT ABRIDGE HIS FREEDOM OF SPEECH AND PRESS

40

V PETITIONER WAS NOT CONVICTED OF "PANDERING", NO STATE STATUTE WAS RETROACTIVELY APPLIED TO INVOKE SUCH A CONCEPT, AND NO SUCH CONCEPT WAS "INVOKED" BY THE COURT BELOW. THE COURT BELOW DID NOT NEGLECT OR REFUSE TO FOLLOW BINDING PRECEDENT

44

VI CALIFORNIA PENAL CODE §§ 311 AND 311.2, AS CONSTRUED AND APPLIED, TO ALLOW THE OBSCENITY OF A BOOK TO BE JUDGED ACCORDING TO STATEWIDE CONTEMPORARY COMMUNITY STANDARDS, DO NOT DEPRIVE PETITIONER OF HIS LIBERTY AND PROPERTY WITHOUT DUE PROCESS OF LAW, AND DO NOT ABRIDGE PETITIONER'S EXERCISE OF FREEDOM'S OF SPEECH AND PRESS UNDER THE FIRST AND FOURTEENTH AMENDMENTS

47

CONCLUSION

50

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
A Book v. Attorney General (1966) 383 U.S. 413, 16 L.Ed.2d 1, 86 S. Ct. 975	18, 20, 24 41, 43-46
Beazell v. Ohio, 269 U.S. 167	46
Bowling, et al. v. California, petition for writ of certiorari pending, United States Supreme Court, October term 1971, No. 71-1572	34
Byrne v. Karalexis, 401 U.S. 216	33
Childs v. Oregon, 401 U.S. 1006	45
Donald v. Jones, 445 F.2d 601	46
In re Giannini, 69 Cal.2d 563	34, 42, 48
Ginsberg v. New York, 390 U.S. 629	28
Hoyt v. Minnesota, 399 U.S. 524	39
Jacobellis v. Ohio, 378 U.S. 184	40, 47

Cases

Page

Karalexis v. Byrne, 306 F. Supp. 1363	33
Manual Enterprises v. Day, 370 U.S. 478	41
People v. Holden, No. CR A 10754, unrep. 1972	42
People v. Luros, 4 Cal.3d 84	34
People v. Newton, 9 Cal.App.3d Supp. 24	42
People v. Noroff, 67 Cal.2d 791	45, 46
People v. Rosakos, 268 Cal.App.2d 497	45, 46
Redrup v. New York, 386 U.S. 767	45
Roth v. United States, 354 U.S. 476	22, 25, 29, 41
Stanley v. Georgia, 394 U.S. 557	16, 21, 26-29, 31, 34
Thompson v. Missouri, 171 U.S. 380	46
United States v. Dellapia, 433 F.2d 1252	32

<u>Cases</u>	<u>Page</u>
United States v. Pink, Superintendent, etc., 315 U.S. 203	41
United States v. Reidel, 402 U.S. 351	26, 27, 32, 33
United States v. Thirty- Seven (37) Photographs, 402 U.S. 363	26, 27, 33
United States v. Thirty- Seven Photographs, etc., 156 F. Supp. 350 (D.C. N.Y. 1957)	34

Codes

California Penal Code:

\$311	4-7, 25, 28, 40, 47
\$311(a) (2)	10, 18, 20, 46
\$311.2	4, 5, 6, 9, 13, 25, 28, 40, 47
\$1127(b)	43
\$1471	3
28 U.S.C. §1257(3)	3

Constitution

Page

United States Constitution:

First Amendment 4, 5, 6, 7, 25,
35, 38, 47

Fourteenth Amendment 4, 5, 6, 7, 26,
35, 38, 47

Article I, Section 10 7

Rules

California Rules of Court:

Rule 24(a) 3

Rule 28(b) 3

Rule 62 3

Rule 63(a) and (3) 2, 19

Texts

Abelson, et al.,
Technical Reports of the
Commission on Obscenity
and Pornography, Volume 6 32

Miscellaneous

The Report of the Commission
on Obscenity and Pornography,
United States Government
Printing Office, September,
1970 29, 30

Miscellaneous

Page

Report of the Effects Panel,
Section B, "Public
Opinion About Sexual
Materials"

30

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1971

No. 71-1422

MURRAY KAPLAN,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles is reported in 23 Cal.App.3d Supp. 9, 100 Cal. Rptr. 372, and is printed in Appendix "A" to the Petition for Certiorari. Petitioner has included in his Petition for Certiorari, at Appendix "B", the original opinion of

said Appellate Department rendered on October 27, 1971, which was superseded and replaced by the above opinion published in 23 Cal.App.3d Supp. 9; said original opinion is, of course, unreported.

JURISDICTION

The judgment of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles (23 Cal.App.3d Supp. 9) was entered on February 7, 1972.

The first opinion of said Appellate Department was rendered on October 27, 1971, and an order correcting it was made on November 3, 1971. On November 10, 1971, said Appellate Department ordered a rehearing (Appendix "D", Petition for Certiorari) on Petitioner's motion.

After rehearing, the Appellate Department, on February 7, 1972, rendered its opinion affirming the judgment of conviction, at the same time certifying the cause to the California Court of Appeal pursuant to Rule 63(a) and (3) of the California Rules

of Court. The Court of Appeal denied said certification on February 17, 1972.

The effect of said denial was that the Appellate Department of the Superior Court of the State of California became the highest State court to which an appeal could be taken. (California Penal Code §1471; California Rules of Court, Rules 62, 24(a) and 28(b)).

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether the law of obscenity has changed, or should be changed, to the extent that the states should be denied the power to regulate admittedly obscene matter unless it is sold to a minor or thrust on an unwilling public.
2. Whether the law of obscenity has changed, or should be changed, to the extent that nothing may be considered to be obscene, or to exceed contemporary standards, or

to appeal to prurient interest, or to be utterly without redeeming social importance, unless it is first sold to a juvenile or thrust on an unwilling public.

3. Whether the book sold by Petitioner is obscene.
4. Whether California Penal Code §311 and §311.2, as construed and applied, deprive Petitioner of his liberty and property without due process of law and abridge his exercise of freedoms of speech and press, contrary to the provisions of the First and Fourteenth Amendments, inasmuch as they allow the prosecution to prove that Petitioner commercially exploited the book for the sake of its prurient appeal to the exclusion of all other values, to prove that the book was utterly without redeeming social value; and whether such evidence is sufficient, as a matter of law, to outweigh evidence, no matter how slight, that the book has some social value.

5. Whether California Penal Code §§ 311 and 311.2, as construed and applied, deprive Petitioner of his liberty and property without due process of law and the equal protection of the laws and abridge his exercise of freedoms of speech and press, contrary to the provisions of the First and Fourteenth Amendments:

(a) Where the prosecution was allowed, without announcing it would do so in the accusatory pleading, to prove that the book sold by Petitioner was utterly without redeeming social importance by proving that Petitioner commercially exploited the book for the sake of its prurient appeal, to the exclusion of all other values, and where a state statute codifying such method of proof became effective prior to Petitioner's trial, albeit after he sold the book; and

(b) Where the California Supreme

Court had ruled that a seller's statement that matter was obscene was insufficient to establish the elements that it went beyond contemporary community standards and appealed to prurient interest.

6. Whether California Penal Code §§ 311 and 311.2, as construed and applied, deprive Petitioner of his liberty and property without due process of law and abridge his exercise of freedoms of speech and press, contrary to the provisions of the First and Fourteenth Amendments, because the standard for judging the alleged obscenity of the book Petitioner sold was based upon the community standards of the State of California and not the standards of the Nation as a whole.

**CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED**

1. The pertinent provisions of the First Amendment to the United States Constitution are:

"Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

2. The pertinent provisions of the Fourteenth Amendment to the United States Constitution are:

"No State shall . . . deprive any person of life, liberty, or property, without due process of law; . . ."

3. The pertinent provisions of Article I, Section 10, of the United States Constitution are:

"No State shall . . . pass any . . . ex post facto laws, . . ."

4. California Penal Code §311, at the time of the commission of the alleged offense, provided as follows:

"As used in this chapter:

(a) 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance.

(b) 'Matter' means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription or mechanical, chemical or

electrical reproduction or any other articles, equipment, machines or materials.

(c) 'Person' means any individual, partnership, firm, association, corporation, or other legal entity.

(d) 'Distribute' means to transfer possession of, whether with or without consideration.

(e) 'Knowingly' means having knowledge that the matter is obscene. (Added Stats. 1961, c.2147, p. 4427, §5)."

5. The pertinent provisions of California Penal Code §311.2, at the time of the commission of the alleged offense, provided as follows:

"(a) Every person who knowingly: sends or causes to be sent, or brings or causes to be

brought into this state for sale or distribution, or in this state prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor."

6. California Penal Code §311(a)(2), which became effective after the commission of the alleged offense, but prior to Petitioner's trial, provides as follows:

"In prosecutions under this chapter, where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the

matter and can justify the conclusion that the matter is utterly without redeeming social importance."

STATEMENT

On May 14, 1969, Sergeant Shaidell of the Los Angeles Police Department went to the Peek-A-Boo Bookstore in the City of Los Angeles to investigate citizen complaints that obscene matter was being sold there (A. 38, 43-44). He had been a vice investigator for approximately eight years, six of them exclusively devoted to pornography investigations (A. 37).

Before entering the store, Shaidell ascertained that Petitioner was the owner (A. 45) although he did not know that the person working in the store when he entered was Petitioner (A. 49). Upon entering, Shaidell observed that only sex-oriented merchandise was displayed (artificial sex devices such as dildos, paperback books, magazines and motion picture films); news and general interest type magazines were not for sale (A. 38).

Shaidell perused several of the books and magazines, whereupon Petitioner advised Shaidell that the Peek-A-Boo was not a library (A. 39). The two then conversed, Shaidell asking if Petitioner had any "good sexy books" (A. 54). Petitioner replied, "All of our books are sexy. Look at this [opening a magazine]. You can see right inside her cunt. Some of these only have the female alone and some of them have ones with the - with a guy and a gal, and they're screwing around (A.54)." After more such conversation, Shaidell asked Petitioner if he had any "real good" paperback books. Petitioner said, "Hey, I'm reading one right now, and its called Suite 69." (A. 55) Petitioner then read a passage to Shaidell, as follows:

"'Suck it, darling, oh, fuck my pussy with your tongue, sweetie,' Gloria grunted, beginning to squirm her naked buttocks on the sheet as Maria's fiery tongue inside her fervid cunt almost drove the young Negress into hysterics." (A. 57)

Shaidell and Petitioner then proceeded to the cash register, Petitioner explained to

Shaidell the degree of explicitness and prices of his films, and the purchase of the book Suite 69 and a magazine was consummated (A. 55).

On May 15, 1969, Sergeant Piazza purchased a sex-oriented motion picture from Petitioner. Thereafter the book and magazine purchased by Shaidell, and the film purchased by Piazza were submitted to the City Attorney for the City of Los Angeles, who filed a three-count complaint, on June 3, 1969 (A. 7), alleging violations of Penal Code §311.2.

Petitioner's trial commenced in the Los Angeles Municipal Court on January 12, 1971. Sergeants Shaidell and Piazza testified as stated above. Hubert Blackwell then testified on behalf of the prosecution. Blackwell had been a police officer for the City of Los Angeles for nearly eight years, and a vice investigator for 16 months. Based on his elicited experience, his formal and practical training and education, and his research, the court allowed Blackwell to testify as an expert on the question of prurient appeal and contemporary standards (A. 121-125) of the book Suite 69 (A. 126).

Part of Blackwell's research consisted of a survey taken by him and two other officers of the Los Angeles Police Department, wherein 20 cities and 19 counties were polled to determine, as objectively as possible, what were the contemporary community standards for the State of California (A. 87-89, 92-98). Blackwell's testimony established that the book Suite 69 met the test for obscenity, i.e., prurient appeal and contemporary community standards (A. 128, 131). The prosecution then rested, having presented no direct evidence that Suite 69 was utterly without redeeming social importance. The jurors, in addition to hearing the book read to them, also inspected the book, and their attention was directed to the advertisements in the back of the book (A. 82).

The only witness called by Petitioner was Frank Laven, an attorney in Los Angeles who specializes in defending persons charged with violating obscenity laws (A. 258, 305-307). He opined that the book Suite 69 does not go beyond customary limits of candor in the State of California (A. 293) and does not appeal to a prurient

interest (A. 302). He also testified that in his opinion all of the charged matter had social importance in that some people could learn about sex from them or be entertained by them (A. 304).

On the question of customary limits of candor and community standards, Laven felt that, pictorially, with the exception of some sex acts without text or description and sometimes excretion, nothing would go beyond contemporary standards (A. 308). Editorially, nothing would exceed contemporary community standards (A. 309). In Laven's opinion, there was probably nothing that would appeal to the prurient interest of the average person (A. 310, 314), and he had never seen any matter which in his opinion would appeal to the prurient interest of the average person (A. 311-314). According to Laven, bestiality graphically depicted would neither appeal to the prurient interest of the average person in the State of California, nor would it go beyond contemporary community standards (A. 315). The same is true of sadism (A. 316), incest (A. 317), and sodomy (A. 319).

Petitioner also introduced into evidence, and had read to the jury, a book entitled Adam and Eve (A. 340), which had been held to be constitutionally protected by the Supreme Court. Said book was presented as "comparable" matter for the jury to consider in deciding the obscenity of Suite 69 (A. 340).

Prior to the trial, Petitioner moved to dismiss the complaint on the basis that sale of matter to an adult, whether obscene or not, is protected by virtue of Stanley v. Georgia, 394 U.S. 557. In connection with said motion, the prosecution stated that the case involved sales to adult police officers (A. 14). Respondent would dispute Petitioner's contention that the record supports his many statements in his brief, that any stipulation was entered into, or that Petitioner never sold to minors or thrust his wares on an unwilling public. Petitioner also moved to dismiss Count 3, involving the sale of Suite 69, on the grounds that it was constitutionally protected as a matter of law. Both motions were denied.

Following deliberation, the jury acquitted Petitioner as to the sale of the film and the magazine, but found him guilty as to the sale of Suite 69.

Petitioner prosecuted an appeal to the Appellate Department of the Superior Court of the State of California for the County of Los Angeles, presenting, inter alia, the following contentions:

- (1) Suite 69 is not obscene;
- (2) The prosecution should have been required to prove, by direct evidence, as an element of the crime, that Suite 69 is utterly without redeeming social importance;
- (3) Community standards of the nation, rather than the state, should have been applied; and,
- (4) The prosecution should have been required to prove that Suite 69 appealed to the prurient interest of its actual or intended audience, or went substantially beyond contemporary limits of candor measured by community standards in the nation as a whole.

On October 27, 1971, the Appellate Department of the Superior Court of the State of California for the County of Los Angeles filed a memorandum opinion and judgment affirming the conviction (Appendix B, Petition for Certiorari). In answering Petitioner's second contention regarding testimony as to social value, the court relied on A Book v. Attorney General (1966) 383 U.S. 413, and also pointed out that that case was the basis for recent California legislation (California Penal Code §311(a)(2)).

Petitioner then filed a Petition for Rehearing and/or Certification to the California Court of Appeal, pointing out that Penal Code §311(a)(2) did not become effective until November 10, 1969, while the complaint alleged that the violation occurred on May 14, 1969 (Petitioner's trial commenced on January 12, 1971).

The Petition for Rehearing was granted on November 10, 1971. On February 7, 1972, the Appellate Department filed its second opinion and judgment, again affirming the conviction; at the same time it certified the cause to the California Court of Appeal

pursuant to Rule 63(a) and (3) of the California Rules of Court. In so doing, the Appellate Department certified the following questions:

- (1) Is the proper community standard in an obscenity prosecution for sale of a book that of the State of California or a national standard?;
- (2) Is it proper to place the burden of going forward with evidence as to the redeeming social value of matter which meets the tests of appeal to prurient interest and exceeding customary standards on the defendant?;
- (3) If the answer to the previous question is in the affirmative, what is the burden of the People in meeting defendant's evidence of redeeming social value?;
- (4) In California may evidence of the circumstances of production, presentation, sale, dissemination, distribution or publicly constitute sufficient evidence of lack of

redeeming social value either under the case of A Book v. Attorney General (Memoirs) (1966) 383 U.S. 413, 420, 16 L.Ed.2d 1, 6, 86 S. Ct. 975 or under Penal Code §311(a)(2)?; and,

- (5) May Penal Code §311(a)(2) be applied in a prosecution for sale or distribution of obscene matter where the sale or distribution occurred before the effective date of such provision?

On February 17, 1972, the Court of Appeal of the State of California, Second Appellate District, Division Three, made its order denying transfer of the cause without comment.

SUMMARY OF ARGUMENT

1. Petitioner was convicted of violating a valid statute which was properly applied. He sold an admittedly obscene book to a police officer who did not state why he wanted to buy it. The officer went to the store because of complaints from the

public, and the record is otherwise barren of any evidence (including any prosecution stipulation) that Petitioner neither thrust his wares on an unwilling public nor sold them to minors. Stanley v. Georgia, 394 U.S. 557, expressly held that the dissemination of obscene matter was still beyond constitutional protection. Adoption of Petitioner's contention would require that the court overrule practically every prior obscenity decision. Any system allowing "appropriately controlled" bookstores raises even more grave constitutional questions than now exist; it is eminently unworkable and has been so proven.

2. The record in the case strongly supports the jury's finding that Suite 69 is "patently offensive".

Petitioner's contentions regarding public opinion of the regulation of obscenity are neither supported by his cited authority nor the record. If this Court were to adopt his theory it would mean that regulation of pornography would be abandoned to its purveyors, a system which even the record in this case shows cannot be accomplished. If public attitudes towards

pornography were as Petitioner describes, there would be no convictions. While it is true that public attitudes have changed since the Roth decision, this Court has consistently held that dissemination of hard-core pornography is beyond the protection of the constitution. A system such as proposed by Petitioner, wherein matter is not classified as obscene until after the effect it has had on the public is weighed, is unworkable and raises grave constitutional questions. The great majority of Americans are still opposed to the dissemination of pornography, and merely because it has some value to some individuals does not mean that it has redeeming social importance.

A mere promise or statement of intent by purveyor of pornography, that he will not sell to minors, is not a "reasonable protection against exposure to juveniles". People in Petitioner's position have also demonstrated that they cannot and will not prevent such matter from being thrust on an unwilling public.

3. Suite 69 is obscene, measured by any realistic standard, including those set

forth in the past by this Court. The question of its obscenity has now been reviewed and unanimously affirmed by two municipal court judges, three judges of the Superior Court Appellate Department, and a jury of twelve of Petitioner's peers. In so doing, they compared Suite 69 to a book (Adam and Eve) which Petitioner claimed and stipulated was most comparable to Suite 69, which book was held not obscene by this Court. The jury implicitly found that Suite 69 was not comparable, and was, in fact, obscene. Petitioner has shown nothing to indicate otherwise.

4. The term "utterly without redeeming social importance" practically defies definition, and should be rewarded or defined so as to provide a workable standard. The Court should declare that it should be considered an affirmative defense, and the defense should be required to prove it at least sufficient to raise a reasonable doubt. The California courts place only the most minimal burden on a defendant, that he merely identify in what area he feels the matter has social value. To do otherwise would require the prosecution to prove a negative out of a void, while all

the time a defendant, who would maintain the matter is a protected form of expression, need not identify in what area of human endeavor it lies. In this case, a proper and valid standard of evidence, as expounded in A Book v. Attorney General, 383 U.S. 413, was applied to support the jury's finding that Suite 69 was utterly without redeeming social importance. The test stated in A Book is a good test in that it protects all legitimate and sincere attempts at creativity, no matter how poorly executed.

5. Petitioner was not convicted of "pandering". His statements were such that they legally amounted to admissions, and could be used against him in following the test set forth by this Court in A Book v. Attorney General, enacted into law prior to Petitioner's trial, merely stated a rule of evidence which had existed in the entire nation since 1966. It created no new crime such as "pandering", and the state of the law has remained the same from long before Petitioner committed the violation until the present.

6. Use of a statewide, rather than nationwide, standard of contemporary community standards was proper. California

standards would favor a defendant in a pornography case. California now requires expert testimony, based on objective methodology, to prove what are the standards; to require proof of national standards would result either in impossibility of proof or relaxation of such a strict burden, to Petitioner's detriment.

I

CALIFORNIA PENAL CODE §§ 311 and 311.2, AS CONSTRUED AND APPLIED TO AUTHORIZE THE JUDGMENT OF CONVICTION OF PETITIONER HEREIN, FOR SELLING AN ADMITTEDLY OBSCENE BOOK TO AN ADULT, DOES NOT DEPRIVE PETITIONER OF HIS LIBERTY AND PROPERTY WITHOUT DUE PROCESS OF LAW AND DOES NOT ABRIDGE PETITIONER'S EXERCISE OF FREEDOMS OF SPEECH AND PRESS

Petitioner contends, while admitting that the book Suite 69 is obscene, that the court should overrule Roth v. United States, 354 U.S. 476, and hold that the sale of admitted hard-core pornography to a "consenting adult" should be protected under the free speech and press and due process provisions of the First and

Fourteenth Amendments to the United States Constitution.

The basis of Petitioner's argument is founded in Stanley v. Georgia, 394 U.S. 557, and has been answered by this Court not only in Stanley (at 394 U.S. 567), but in United States v. Reidel, 402 U.S. 351, and United States v. Thirty-Seven (37) Photographs, 402 U.S. 363.

Perhaps Petitioner seeks to change the court's collective mind, or sway individual opinions, by asserting that a different set of facts exists, by asserting that the respondent "stipulated" that Petitioner "neither sold the material in his bookstore to minors nor thrust it upon the general public". Such allegation is totally unsupported by the record. Petitioner has referred to the Appendix, page 14, in support of this alleged "stipulation". The record clearly shows that the prosecutor, in an in-chambers discussion of Petitioner's pretrial motion to dismiss, stated that his case involved sales to a police officer. Neither the record nor respondent has information as to whether or not Petitioner sold also to minors, or thrust his

merchandise on an unwilling public, other than citizen complaints (A. 38, 41-44).

The substantial factual difference between this case and those in United States v. Thirty-Seven Photographs is that here there is an even greater danger of the very risks Petitioner conceded, that the matter may come within the possession of children or be thrust on an unwilling public.

The right of any citizen to be free from Government thought control may be absolute, but it does not protect others who stimulate his thoughts with conduct. As the court stated in United States v. Thirty-Seven Photographs, 402 U.S. 363, 376, rejecting the same argument, "Whatever the scope of the right to receive obscenity adumbrated in Stanley, that right, as we said in Reidel [United States v. Reidel, 402 U.S. 351], does not extend to one who is seeking, as was Luros here, to distribute obscene materials to the public"

Petitioner misses the point of Reidel and Thirty-Seven Photographs in saying that the single incident of a sale to a police

officer comes within the purview of Stanley. The purchase by the police officer is nothing more than an investigatory method designed to demonstrate conditions which this Court has again and again stated may be regulated. No one knows but what Petitioner's next customer was a child, or if he sometimes peddles his pornography door-to-door.

California Penal Code §§ 311 and 311.2 are not so broad that they unreasonably restrict a person's rights to think and read what he pleases, and they in no way invade any recognized rights of privacy.

II

OBSCENE MATTER IS NO LESS OBSCENE
MERELY BECAUSE IT IS SOLD TO AN
ADULT INSTEAD OF A CHILD, OR FORCED
ON AN UNWILLING ADULT, AND STATE
REGULATION IS PROPER AND NECESSARY

Merely because a state may bar distribution to children of books deemed suitable for adults (Ginsberg v. New York, 390 U.S. 629) does not mean, as Petitioner contends, that the state may not reasonably restrict

the sale of obscene matter by virtue of the fact that the sales are not to children.

This Court has made clear, in its decisions since Stanley v. Georgia, that there was no "new chapter" in the sage of obscenity. Under our Constitution no case can ever be the final chapter, but the clear public interest in and desire for a decent society mandate that a chapter be written which will recognize pornography for the pollution that it is.

While arguing that Roth v. United States, 354 U.S. 476, is still good law containing a good test of obscenity, Petitioner also argues that Roth must now die of some sort of attrition because contemporary community standards have changed to the extent that absolutely any kind of matter is acceptable to the American public.

In making such a fantastic claim for the degeneration of American morals, Petitioner relies on oversimplifying the findings and results of a poll taken by the Commission on Obscenity and Pornography, published in The Report of the Commission on Obscenity and Pornography, United States

Government Printing Office, September 1970. He draws a debatable conclusion from said poll while ignoring other evidence in the Report to the contrary, as well as other existing polls and evidence. For instance, a poll of community standards taken in California indicated that 99% of that community felt that film depiction of simulated sex acts went beyond community standards and appealed to a prurient interest (A. 134).

He fails to acknowledge many other public opinion surveys on the question of obscenity, such as the Gallup and Harris polls, which contradict the Commission poll (Report of the Effects Panel, Section B, "Public Opinion About Sexual Materials").

Petitioner looks to the Commission's conclusions about its poll to support his conclusions about public opinion, yet the Commission's poll is inconclusive and does not say what Petitioner says it says.

While "almost 60%" (actually 59%) believed that adults should be allowed to read or see any explicit materials they want to, this indicates nothing more than

a concurrence with the philosophy of Stanley v. Georgia. It is not an indication of public opinion as to customary limits of candor according to contemporary community standards. Nearly half of the "almost 60%" favored Governmental regulation of dissemination of pornography because of a concern for children and young people. Only 52% had no objection ("it would be 'all right'") to make such material available to adults on some private basis. Only 53% felt it was "all right" for adults to have access to textual material which merely contains a description of male and female sex organs, and only 29% felt it was "all right" to admit adults to movies which might or might not be hard-core pornography. The statistics of the Commission hardly indicate an "anything goes" consensus of American public opinion, nor are they any indication of contemporary community standards. In fact, according to research done for the Commission by its poll-takers, by far the most prevalent reaction to sexual materials was that of disgust; reaction to sexual materials would seem a more accurate indicator of contemporary community

standards regarding such matter (Abelson, et al., Technical Reports of the Commission on Obscenity and Pornography, Volume 6).

Respondent submits that Petitioner's theory based on the empirical evidence gathered by the Commission, is incorrect.

Petitioner also seems to feel that the trend of judicial thought in this country is to a theory that the obscenity of a particular item must be judged according to the prurient appeal it would have for its intended recipient. In so arguing, he indulges in some misrepresentation. When Justice Harlan spoke of explicit sexual material as "memorabilia of a man's thoughts and dreams", he did so in an opinion flatly rejecting petitioner's argument (United States v. Reidel, 402 U.S. 351). The court in United States v. Dellapia, 433 F.2d 1252, goes on to say, in the paragraph following the one quoted by Petitioner:

"It may be that one who would claim first amendment protection of his privacy could, as under the fourth amendment, 'break the seal

of sanctity and waive his right to privacy.' Lewis v. United States, 385 U.S. 206, 213, 87 S.Ct. 424, 428, 17 L.Ed. 2d 312 (1966) (Brennan, J., concurring), by for example engaging in a commercial enterprise. Public display of obscenity even to consenting adults, or private possession with an intent to distribute publicly, present cases which are not before us. Booksellers will not as a result of our decision today be free to maintain 'emporium[s] for smut'."

Karalexis v. Byrne, 306 F. Supp. 1363, in addition to the fact that it was vacated by this Court (Byrne v. Karalexis, 401 U.S. 216), somewhat preceeded United States v. Reidel, 402 U.S. 351, and United States v. Thirty-Seven Photographs, 402 U.S. 363. This Court did not even see fit to discuss the "consenting adult" theory, perhaps because it did so a few months later. Moreover, Karalexis v. Byrne was a divided opinion.

United States v. Thirty-Seven Photographs, etc., 156 F. Supp. 350 (D.C. N.Y. 1957), was an opinion of a single trial judge in a truly unique factual situation, and, since it is fifteen years old, can hardly be said to represent a trend.

Contrary to Petitioner's contention, the California decisions most definitely not been moving towards Petitioner's theory. It was rejected by the California Supreme Court in People v. Luros, 4 Cal.3d 84, 90. The court called the argument "ingeniously concatenated" and stated such an analysis of Stanley v. Georgia to be incorrect and without merit. In re Gianini, 69 Cal.2d 563, merely stands for the proposition that a topless dance is a theatrical performance that must be prosecuted on an obscenity theory even though the charged violation is lewd conduct or indecent exposure. The trend in California is seemingly slightly reversed at the present time (see Bowling, et al. v. California, petition for writ of certiorari pending, United States Supreme Court, October term, 1971, No. 71-1572).

If one turns to Glancy v. County of Sacramento as cited, in the official California Appellate Reports, one will find only a blank page. The only supposition that can reasonably be made from the granting of a hearing by the California Supreme Court, over a year ago, is that it apparently disagrees with the theory.

Petitioner's theory - that the seller of hard-core pornography ought to be protected by the First and Fourteenth Amendments to the Constitution, when matter is sold from an "appropriately controlled" bookstore to a "consenting adult", with "reasonable protections" against exposure to juveniles and being thrust on an unwilling public - is unrealistic, unworkable, and fraught with its own constitutional dangers.

Any Governmental attempt to control Petitioner's activities through a licensing system, such as exists with alcoholic beverages, would raise serious questions about prior restraints.

Petitioner's concept of an "appropriately controlled" bookstore with "reasonable

safeguards" is simply his hollow and platitudinous way of saying he should be left free and unfettered in his pursuit of the peddling of pornography, and he will "promise" not to sell to persons he knows to be juveniles, or mail his material to persons who have not requested it. If either of these things should unfortunately occur, Petitioner would presumably apologize gracefully.

Petitioner's plan would not work. The Report of the President's Commission shows that under present laws juveniles still come into possession of pornography. Legalizing distribution to adults would certainly cause an increase in juvenile possession through redistribution. Respondent does not say that Petitioner should then be prosecuted, but only that allowing free and easy distribution to adults would of necessity result in less protection from exposure to juveniles.

It is also a fallacy to say that Petitioner would not "thrust pornography on an unwilling public". The police investigated Petitioner because they had received complaints from citizens (A. 38, 43-44).

There were approximately 250 "adult book-stores" in the City of Los Angeles in September 1970 (A. 58); by legalizing them a public display (probably due to increased competition) would be certain to occur, as it did in Denmark. The public, willing or not, would have to add it to the list of the other pollutants with which it is forced to live. If an unwilling citizen now receives unsolicited pornography in the mail, he must take affirmative action to prevent a future occurrence.

The average citizen wonders why this is so; he wonders why it is so that sexually explicit matter, displayed in a manner calculated to appeal to prurient interest, is presently sold from newspaper vending machines up and down the sidewalks of his city; he wonders if this is what the Constitution means by freedom of speech.

Respondent questions Petitioner's sincerity in claiming he should be trusted not to sell to minors and not to intrude on the public. His brief is not exactly a paragon of forthrightness; he has indulged in flights of fancy with a practically non-existent "stipulation"; he has cited cases

for propositions opposite their holdings; he has cited cases where more recent controlling cases refuting his proposition go uncited; he has cited reversed and vacated cases, by omission of a word or a paragraph in a quoted opinion he has made misleading statements of holdings. These things may well be accidental, but Petitioner is playing with a loaded gun; carelessness by him in self-regulation would be just as bad as deliberateness.

III

THE BOOK SUITE 69 IS OBSCENE AND IS
NOT PROTECTED BY THE FREE SPEECH
AND PRESS AND DUE PROCESS PROVI-
SIONS OF THE FIRST AND FOURTEENTH
AMENDMENTS

Whether or not Suite 69 is obscene is something this Court must determine by independent review. Respondent respectfully submits that an independent review will result in a finding of obscenity. Suite 69 is a compilation of sexual adventures and perversions luridly dealt with in a shocking, morbid and shameful manner. It

consists of some 180 pages of unrelated erotic scenes. There is no theme, plot or character development, only graphically depicted and emphatically described sex acts, which include repeated acts of masturbation, oral copulation, voyeurism, lesbianism, homosexuality, sadism and sodomy. Sex omitted, the book would consist of 180 blank pages.

The essence of Petitioner's argument is that no book can ever be obscene, and the only authority for the argument is a list of other books held not obscene by this Court. Petitioner presented one of said books (Adam and Eve, Hoyt v. Minnesota, 399 U.S. 524) to the jury, and the jury was instructed to compare said book with Suite 69. The jury was instructed that said book was not obscene, and that such fact must be considered by them in determining obscenity (A. 445-446).

Two other counts involved a pictorial magazine and a motion picture, and other "comparables" were introduced by Petitioner for the same purpose. After considering Petitioner's comparable exhibits and comparing them with the charged film, magazine

and Suite 69, the jury acquitted Petitioner as to the film and magazine. No jury could have had the benefit of more information and analysis. While this Court's power to review is an independent one, how far can one in good conscience go; how lightly can the jury's verdict be regarded, in keeping faith with the jury system? (See dissent of Warren, C.J., Jacobellis v. Ohio, 378 U.S. 184, at 202-203.)

IV

CALIFORNIA PENAL CODE §§ 311 AND 311.2, CONSTRUED AND APPLIED TO ALLOW THE PROSECUTION TO PROVE THAT MATTER IS UTTERLY WITHOUT REDEEMING SOCIAL IMPORTANCE BY PROVING THAT IT WAS COMMERCIALY EXPLOITED FOR THE SAKE OF ITS PRURIENT APPEAL, TO THE EXCLUSION OF ALL OTHER VALUES, DOES NOT DEPRIVE PETITIONER OF HIS LIABILITY AND PROPERTY WITHOUT DUE PROCESS OF LAW, AND DOES NOT ABRIDGE HIS FREEDOM OF SPEECH AND PRESS

The first hurdle for Petitioner is to show thst the test of "utterly without redeeming social importance" is an element

of obscenity which must be proven by the prosecution to establish a prima facie case. Social importance was not clearly articulated as a test for obscenity until A Book v. Attorney General, 383 U.S. 413; three justices used the words: "three elements must coalesce: 'It must be established . . . (c) the material must be utterly without redeeming social value.'" (383 U.S. at 418, emphasis added.)

Since only three justices concurred in this statement, no authoritative precedent was established (United States v. Pink, Superintendent, etc., 315 U.S. 203). The statement is generally accepted in some form and with some effect because of its underlying philosophy. But does a majority of the court feel it is elemental, or definitional, as in Roth v. United States, 354 U.S. 476 and Manual Enterprises v. Day, 370 U.S. 478?

Respondent believes that the test should be considered an affirmative defense, requiring proof by a Petitioner sufficient to raise a reasonable doubt that the matter contains something of social value sufficient to redeem it. The Appellate

Department of the Superior Court of the State of California for the County of Los Angeles has decided that a defendant has the burden only of going forward with some evidence of social value, upon which the prosecution is required to prove the matter is utterly without redeeming social importance. The court said: "The reason for this rule is that when prurient interest is predominant and the customary limits of candor are exceeded it is difficult to conceive wherein social value might be. Rather than require the People to start in this void the defendant must make the start by producing some evidence of social value. Only then do the People know in what area they have to proceed" (People v. Holden, Appellate Department, Superior Court of Los Angeles County, State of California, No. CR A 10754, unrep. 1972). In 1970, the same court stated that the prosecution should not be required to "start in a void and prove a negative" (People v. Newton, 9 Cal.App.3d Supp. 24). It also noted that the California Supreme Court apparently agreed, in In re Giannini (1968) 69 Cal.2d 563, (9 Cal.App.3d Supp. at 28).

The second question is whether Petitioner's evidence contained any proof of redeeming social importance. Petitioner called a defense attorney, specializing in defending obscenity cases, who opined that the film, magazine, and Suite 69 all had social importance in that, to some people they in some instances "educate persons as to sex"; also, some persons might be entertained (A. 304).

This testimony, Petitioner claims, establishes that all of the material had redeeming social importance. Nothing could more clearly and patently violate what this Court has intended in its statements regarding social value. California juries have the right to disregard expert opinion if they find it to be unreasonable (California Penal Code §1127[b]), and the jurors in this case were amply justified in rejecting it.

The jury's determination that Suite 69 is utterly without redeeming social importance also finds support in this Court's own statement in A Book v. Attorney General, 383 U.S. 413, 420, wherein it was said that a book which is patently offensive, which

has the requisite prurient appeal, and which contains a minimum of social value, may still be utterly without redeeming social importance where the evidence shows it was commercially exploited for the sake of its prurient appeal. This is exactly what Petitioner did, and he should not be heard to complain because his evaluation was accepted by the jury.

V

PETITIONER WAS NOT CONVICTED OF "PANDERING", NO STATE STATUTE WAS RETROACTIVELY APPLIED TO INVOKE SUCH A CONCEPT, AND NO SUCH CONCEPT WAS "INVOKED" BY THE COURT BELOW. THE COURT BELOW DID NOT NEGLECT OR REFUSE TO FOLLOW BINDING PRECEDENT

The opinion of the Appellate Department makes clear that Petitioner was not convicted of "pandering". Neither was a "concept" of pandering "devised". Rather, the court below carefully followed the law as set forth by the United States Supreme Court in A Book v. Attorney General, 383 U.S. 413, 420, in determining the

sufficiency of the evidence. The court did not say that Petitioner's discussion of Suite 69 constituted pandering, it merely held that the jury was justified in accepting Petitioner's statements at face value on the issue of social value.

Childs v. Oregon, 401 U.S. 1006, is not applicable here, mainly because it is per curiam citing Redrup v. New York, 386 U.S. 767, but also because the evidence is not "virtually identical". In Childs, the Petitioner merely referred the officer to a group of books containing the "worst ones"; here, Petitioner recommended a specific book and read aloud to the officer from it. Under such circumstances, the law of A Book v. Attorney General was properly applied to support the jury's finding that Suite 69 was utterly without redeeming social importance.

In People v. Noroff, 67 Cal.2d 791, and People v. Rosakos, 268 Cal.App.2d 497, it was held that the matter, upon independent review, did not meet the Roth test for obscenity, and that the missing element of prurient interest could not be supplied by pandering. The Appellate Department in

this case properly held Noroff and Rosakos not applicable, in that the question presented here went to the manner of proof rather than the lack of it.

Since the California legislation codifying the rule of A Book v. Attorney General became effective November 10, 1969, and Petitioner was charged with violating the statute some six months earlier, he claims he is the victim of an ex post facto law. Section 311(a)(2) does not create a new crime, but merely codifies a rule of evidence followed since A Book v. Attorney General came down. Petitioner's argument is without merit since no contrary California law was changed by the enactment of §311(a)(2).

Further, §311(a)(2) is merely a rule of evidence which became effective fourteen months before Petitioner's trial and thus was not ex post facto (Thompson v. Missouri, 171 U.S. 380; Beazell v. Ohio, 269 U.S. 167, 171; and Donald v. Jones, 445 F.2d 601, 604-605).

VI

CALIFORNIA PENAL CODE §§ 311 AND 311.2, AS CONSTRUED AND APPLIED, TO ALLOW THE OBSCENITY OF A BOOK TO BE JUDGED ACCORDING TO STATE-WIDE CONTEMPORARY COMMUNITY STANDARDS, DO NOT DEPRIVE PETITIONER OF HIS LIBERTY AND PROPERTY WITHOUT DUE PROCESS OF LAW, AND DO NOT ABRIDGE PETITIONER'S EXERCISE OF FREEDOM'S OF SPEECH AND PRESS UNDER THE FIRST AND FOURTEENTH AMENDMENTS

Jacobellis v. Ohio, 378 U.S. 184, supplied no guidance for state courts on the issue of a national versus state standard, inasmuch as two justices felt a national standard should apply, two favored a state standard, four expressed no opinion, and one seemingly leaned toward a state standard. Today only one justice expressing an opinion remains on the court. Petitioner would solve the problem by blind adherence to narrow rules rather than approach the question from a standpoint of developing a test which would afford protection to First Amendment rights and still be rational.

For instance, a rule could develop that national standards should apply, but the jury could determine what that standard

is on the basis of their own information. Such a rule would afford little protection to Petitioner.

Respondent views the question as one of quantity versus quality. Thus, the California Supreme Court held, in In re Giannini, 69 Cal.2d 563, that a statewide standard was appropriate, but that it must be established by expert testimony. This has resulted in the contemporary community standards of the State of California being objectively determined by the taking of a scientifically conducted statewide opinion poll approximately every six months. Thus, the quality of the evidence on this point is high.

Imposition of a requirement that a national standard be proved would make such survey virtually impossible. Furthermore, it is more than likely that such hypothetical national standard, if it could be determined, would tend to be more stringent and restrictive than California's standards.

Thus, while a national standard might be better for Petitioner because it would be more difficult to prove, the quality of

evidence needed to prove such would of necessity suffer. A national standard might be determined by reference to mass media, which undoubtedly is a strong factor in both determining and reflecting contemporary community standards. Television, major studio motion pictures, mass circulation magazines and bestselling books could be held to reflect national standards. In this situation, anything more explicit than the Playboy centerfold or The Sensuous Woman would run the risk of being held obscene.

Clearly, the California method of proof, involving such exacting quality, must be held sufficient under the Constitution.

CONCLUSION

For the foregoing reasons, the judgment herein should be affirmed.

Respectfully submitted,

ROGER ARNEBERGH
City Attorney

DAVID M. SCHACTER
Chief of the
Appellate Department

WARD GLEN McCONNELL
Deputy City Attorney

Attorneys for Respondent

THE BRIEF SHOP

legal printers

10844 VENTURA BLVD.,
POPLAR 3-2965

NORTH HOLLYWOOD
TRIANGLE 7-8620

SUBJECT INDEX

	Page
Preliminary Statement	1
I.	
An Adult Has a Fundamental Personal Right to Read or View Anything He Chooses. The State May Not Interfere With This Right by Punishing a Bookseller for Selling a Book to a Consenting Adult, in the Absence of Evidence in the Record of a Subordinating State Interest Which Is Compelling	6
II.	
Respondent Has Failed to Establish a Compelling Reason, or Even a Rational Basis, for Interfering With the Fundamental Right of an Adult to Read or View Whatever He Chooses	16
Conclusion	24
Appendix A. The News	App. p. 1

TABLE OF AUTHORITIES CITED

Cases	Page
Aday v. Municipal Court, 210 Cal.App.2d 229, 26 Cal.Rptr. 576 (1962)	20, 21
American Art Enterprises, etc., et al. v. Superior Court, Ct. of App., State of Calif., 2nd Appellate Dist., 2d Civ. No. 40950	23
Butler v. Michigan, 352 U.S. 380	18, 19
Chaplinsky v. New Hampshire, 315 U.S. 568	11
Cinema Classics Ltd. v. Busch, 339 F.Supp. 43 (1972)	21, 22
Cohen v. California, 403 U.S. 15	10, 12
Dyson v. Stein, 401 U.S. 200	20, 21
Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029	6, 7, 11, 13, 15
Ginsberg v. New York, 390 U.S. 629	16, 17, 18
Gooding v. Wilson, 405 U.S. 518	10
Griswold v. Connecticut, 381 U.S. 479	6, 10, 12, 14
Jackson, Ex Parte, 96 U.S. 727	13
Klor, In re, 64 Cal.2d 816, 415 P.2d 791, 51 Cal. Rptr. 903 (1966)	9
Lovell v. Griffin, 303 U.S. 444	6, 12
Mapp v. Ohio, 367 U.S. 643	9
Memoirs v. Massachusetts, 383 U.S. 413	23
N.A.A.C.P. v. Alabama, 377 U.S. 288	13
Olmstead v. United States, 227 U.S. 438	7
People and Busch v. American Art Enterprises, Inc. etc. et al., S.Ct., St. of Calif., County of Los Angeles, No. C-37091	22
Prince v. Commonwealth of Massachusetts, 321 U.S. 158	17

iii.

	Page
Rosenfeld v. New Jersey, U.S., 92 S.Ct. 2479 (1972)	10, 11
Roth v. United States, 354 U.S. 476	13, 23, 24
Smith v. California, 361 U.S. 147	23
Stanley v. Georgia, 394 U.S. 557	3, 5, 6, 8, 9, 15, 19
State v. Mapp, 170 Ohio St. 427, 166 N.E.2d 387 (1960)	7
Thornhill v. Alabama, 310 U.S. 88	6
United States v. Klaw, 350 F.2d 155	24
United States v. O'Brien, 39 U.S. 367	12
United States v. Reidel, 402 U.S. 351	8, 9, 23
United States v. 37 Photographs, 402 U.S. 351 ..	9, 23
United States v. Vuitch, 402 U.S. 62	20, 24
West Virginia State Bd. of Ed. v. Barnette, 319 U.S. 624	9
Williams v. District Court, 136 U.S. App.D.C. 56, 419 F.2d 638 (1969)	11

Miscellaneous

Commission Report, p. 129	3
Report of the Commission on Obscenity and Por- nography (U.S. Govt. Printing Office, 1970), pp. 100-102, 128-130	2, 3
Van Nuys News (Sept. 26, 1972)	22

Statutes

California Penal Code, Sec. 311.2	3
United States Constitution, Art. III	11
United States Constitution, First Amendment	1, 7, 17, 20, 24
United States Constitution, Fourth Amendment	1

	Page
United States Constitution, Ninth Amendment	1
United States Constitution, Fourteenth Amendment	1

Textbooks

11 Annual James Madison Lecture, New York Law Journal (April 1, 1970)	13
Wright, "The Role of the Judiciary: From Marbury to Anderson", 60 Calif.L.Rev. 1262, 1267-1268 (Sept. 1972)	23

IN THE
Supreme Court of the United States

October Term, 1972

No. 71-1422

MURRAY KAPLAN,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITIONER'S REPLY BRIEF.

Preliminary Statement.

1. Respondent asserts, erroneously, that the book in question is "admittedly obscene" (Resp. Br., 20, 25). In fact, petitioner claims that the book is not obscene and is unconditionally protected by the First and Fourteenth Amendments because it is legally indistinguishable from other books afforded such protection by the Court (Pet. Br., 56-58). Petitioner also claims that, under the "variable obscenity" concept, the book herein is not obscene because it was sold to a consenting adult (Pet. Br., 26-58). It is true that in Point I, petitioner assumed, *arguendo*, that the book was obscene. Nevertheless, petitioner claims that a consenting adult has a fundamental personal right, a right of privacy flowing from the First, Fourth, Ninth and Fourteenth Amendments to the United States Constitu-

tion, to read the book, and that petitioner, a bookseller, has standing to assert that right. It is therefore inaccurate to state, as respondent does, that the book, *Suite 69*, is "admittedly obscene".

2. Respondent asserts that the record shows only that petitioner sold a "book to a police officer who did not state why he wanted to buy it"; that the officer went there because of complaints from the public; and that "the record is otherwise barren of any evidence (including any prosecution stipulation) that petitioner neither thrust his wares on an unwilling public nor sold them to minors" (Resp. Br., 20-21).

The "complaints from the public" consisted of a letter from the office of one of the Councilmen of the Los Angeles City Council, addressed to the Chief of Police of Los Angeles and then forwarded to a division of the Los Angeles Police Department. The nature of the complaint was never determined. [A. 40].¹

The record reflects that the police officer came to petitioner's store because Administrative Vice was checking on different locations "known as adult-type book stores" [A. 45]. At the time, there were approximately 250 such adult book stores in the City of Los Angeles [A. 58]. There were of course additional such stores in the County of Los Angeles [A. 58], the State of California [A. 200-202], and the Nation [*Report of the*

¹The officer testified, over objection that it was hearsay, that he had spoken to other police officers and that there were "only about three or four [complaints] that we talked about" [A. 43-44]. The period of time covered by the complaints, and the nature thereof, were not revealed in the record.

Commission on Obscenity and Pornography (U.S. Govt. Printing Office, 1970), 100-102, 128-130].²

The record reflects that the sale in question was solely to a consenting adult and did not implicate minors or invade the privacy of the general public. Before trial, petitioner moved to dismiss the complaint on the ground that California Penal Code §311.2 "is no longer a valid law to prosecute under" where there is dissemination of books, magazines and films "to consenting adults and where there's no claim, as there is no claim here, that there is a dissemination to minors; that under the authority of . . . *Stanley v. Georgia* . . . such a prosecution is not viable because any form of expression does enjoy First Amendment protection unless the specific problems indicated earlier are present, *i.e.*, a dissemination to minors or an intrusion into the privacy of the public, neither of which is present in this case". [A. 10]. Respondent replied that *Stanley* "is limited . . . to the specific facts of private possession in one's own home" and does not "make any other distinction" concerning minors or thrusting upon an unwilling audience [A. 10]. Following argument as to the reach of *Stanley* [A. 11-13], the trial judge stated:

"It's the Court's opinion that the thrust of the defense motion goes to the ultimate facts that may be developed at trial which the court is not prepared to rule on at the present time. Under good

²"The profile of a patron of adult stores that emerges from . . . observations in different parts of the United States is: white, middle-aged, middle-class, married, male, dressed in business suit or near casual attire, shopping alone". [*Commission Report*, 129].

pleading practices, it's not necessary that facts be pled. From the language of the complaint . . . the language would certainly permit the People to —that is, the framework of the presentation would permit the People to prove that such material was being offered to adults, that it might constitute an assault on privacy, and that the general public would include minors as well." [R. 13-14].

Thereafter petitioner's counsel interjected, stating that he thought that respondent would stipulate that respondent did not "intend to prove dissemination to minors nor . . . assault on the general public by public display" [A. 14]. Respondent agreed that it intended to prove that petitioner distributed the book "to an adult" [A. 14]. When petitioner's counsel inquired whether respondent's stipulation "is that there is no attempt or claim to prove that there was a dissemination to minors or a public display to the general public in any fashion", respondent agreed tentatively, saying, however, "I have to check. There may be a fact with regard to an unwilling party". [A. 14]. The record discloses that in fact there was no "unwilling party" involved.

The book was sold to a police officer with 16½ years of police experience. He was plainly an adult and could not have been less than 35 years of age. After the policeman was browsing in the store for approximately 30-40 minutes, the following exchange occurred between him and the petitioner:

"[PETITIONER]: This is not a library. Can I help you?

"[POLICE OFFICER]: Yeah, do you have any sexy books?

"[PETITIONER]: All of our books are sexy.

"[POLICE OFFICER]: Well, how about some paperback books, you know? Do you have any real good ones?

"[PETITIONER]: Hey, I'm reading one right now, and it's called *Suite 69*." [A. 54-55].

After petitioner read the policeman a portion of the book, he purchased it for \$1.95 [A. 55].

When respondent offered the book in evidence, petitioner objected to its introduction on the ground, *inter alia*, that petitioner's sale to a consenting adult was protected by the Constitution, as interpreted by *Stanley*, "whether or not the material is obscene. That's based on the principle that the First Amendment protects the dissemination of any [publication], including obscenity, to adults." [A. 61]. Respondent replied that *Stanley* is "narrowly limited to private possession in one's home" [A. 61].

It is thus clear that the uncontradicted record (including the prosecution stipulation) reveals that petitioner was convicted solely for selling the book to a consenting adult who asked for a "good sexy book". There is nothing in the record to suggest that there was any sale to minors, or any thrusting of sexually explicit publications upon an unwilling public.

This Reply Brief deals solely with Points I and II of respondent's Brief.

I.

An Adult Has a Fundamental Personal Right to Read or View Anything He Chooses. The State May Not Interfere With This Right by Punishing a Bookseller for Selling a Book to a Consenting Adult, in the Absence of Evidence in the Record of a Subordinating State Interest Which Is Compelling.

Respondent concedes that the right of a person "to be free from government thought control may be absolute", but argues that such a right "does not protect others who stimulate his thoughts. . . ." (Resp. Br., 27). Respondent is in error, it is respectfully submitted, in its assertion that petitioner, a bookseller, has no right "to stimulate thoughts" or to assert the right of an adult to have his thoughts stimulated. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479; *Eisenstadt v. Baird*, 405 U.S. 438; *Lovell v. Griffin*, 303 U.S. 444; *Thornhill v. Alabama*, 310 U.S. 88.

A. It is now clear that the right of a person "to be free from government thought control" stands as a bar to the State interfering with the right of an adult to read or view whatever he chooses. In *Stanley v. Georgia*, 394 U.S. 557, the Court protected two vital interests: freedom of mind and thought, and privacy of one's home. After stating that the freedoms of speech and press "necessarily protect the right to receive" and that this right to receive information and ideas, "regardless of their social worth . . . is fundamental to our free society", the Court went on to state that this right "takes on added dimension" because the State had invaded of their social worth . . . is fundamental to our free the privacy of Stanley's home [394 U.S. at 564]. Mr. Justice Marshall quoted with approval the now famous

words of Justice Brandeis, dissenting in *Olmstead v. United States*, 227 U.S. 438, 478:

"The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man."⁹

If the First Amendment means anything, Mr. Justice Marshall stated, it means that a State has no business telling a man "what books he may read or what films he may watch" [394 U.S. at 565]. Justice Marshall cited with approval the opinion of Judge Herbert, "dissenting" in *State v. Mapp*, 170 Ohio St. 427, 166 N.E.2d 387 (1960). Judge Herbert is quoted as follows:

"I cannot agree that mere private possession of * * * [obscene] literature by an adult would constitute a crime. The right of the individual to read, to believe, or disbelieve, and to think without governmental supervision is one of our basic liberties, but to dictate to the mature adult what books he may have in his own private library

⁹In *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 1038, n. 10, the Court stated that *Stanley* emphasized that the Constitution protects the fundamental right to be free, "except in very limited circumstances, from unwanted governmental intrusions into one's privacy." Reference was then made to Mr. Justice Brandeis' above mentioned statement.

seems to the writer to be a clear infringement of his constitutional rights as an individual." [394 U.S. at 562, n.7].

In the case at bar, petitioner invokes the "right to read", a constitutional right of privacy afforded in *Stanley* and recognized in *United States v. Reidel*, 402 U.S. 351. In *Reidel*, Mr. Justice White, speaking for the Court, said:

"The right Stanley asserted was 'the right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home.' 394 U.S., at 565, 89 S.Ct. at 1248. The Court's response was that 'a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.'" [402 U.S. at 355-356].

Mr. Justice White then stated that "[t]he focus of this language was on freedom of mind and thought. . . . The personal constitutional rights of those like *Stanley* to possess and read obscenity in their homes and their freedom of mind and thought do not depend on whether the materials are obscene or whether obscenity is constitutionally protected. Their rights to have and view that material in private are independently saved by the Constitution." [402 U.S. at 356]. Mr. Justice Harlan, concurring, stated that the "constitutionally protected interest in the *Stanley* situation which restricts governmental efforts to proscribe obscenity is the First Amendment right of the individual to be free from governmental programs of thought control, however such pro-

grams might be justified in terms of permissible objectives" [402 U.S. at 359]. For Justice Harlan, "*Stanley* rests on the proposition that freedom from governmental manipulation of the content of a man's mind necessitates a ban on punishment for the mere possession of the memorabilia of a man's thoughts and dreams, unless that punishment can be related to a state interest of a stronger nature than the simple desire to proscribe obscenity as such" [402 U.S. at 359]. *Stanley* recognizes, he said, "a right to a protective zone insuring the freedom of a man's inner life, be it rich or sordid" [402 U.S. at 360]. Justice Harlan then cited *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624, 642, where the Court said that the State is without constitutional power to invade "the sphere of intellect and spirit which it is the purpose of our First Amendment to the Constitution to preserve from all official control". Mr. Justice Marshall, concurring in *United States v. Reidel*, and dissenting in *United States v. 37 Photographs*, 402 U.S. 351, 360, said that *Stanley* "unequivocally rejected the outlandish notion that the State may police the thoughts of its citizenry."

In *Mapp v. Ohio*, 367 U.S. 643, 672, Mr. Justice Stewart, bypassing the search and seizure issue, voted to reverse the judgment therein because he was persuaded that the statute (prohibiting the possession of obscene material) upon which the petitioner's conviction was based was "not consistent with the rights of free thought and expression assured against state action by the Fourteenth Amendment". A similar view was expressed by the California Supreme Court in *In re Klor*, 64 Cal.2d 816, 415 P.2d 791, 51 Cal.Rptr. 903 (1966). The Court there held that the State may not, constitutionally, make it a crime to write, paint or draw

an obscene work, saying: "Such a statute would approach an interdiction of individual expression in violation of the First and Fourteenth Amendments." [51 Cal.Rptr. at 906].

In *Griswold v. Connecticut*, 381 U.S. 479, the Court said that the "State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read" [381 U.S. at 482]. In *Cohen v. California*, 403 U.S. 15, Mr. Justice Harlan stated that "[w]holly neutral futilities * * * come under the protection of free speech as fully as do Keats' poems or Donne's sermons. . . ." [403 U.S. at 25]. After stating that "words are often chosen as much for their emotive as their cognitive force", Justice Harlan warned against outlawing particular words, saying:

" . . . Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views. We have been able, as noted above, to discern little social benefit that might result from running the risk of opening the door to such grave results." [403 U.S. at 26].

See also, *Gooding v. Wilson*, 405 U.S. 518; *Rosenfeld v. New Jersey*, U.S., 92 S.Ct. 2479 (1972).

In *Rosenfeld*, the Court vacated a judgment of conviction and remanded the case for reconsideration in the light of *Cohen v. California*, 403 U.S. 15, and *Gooding v. Wilson*, 405 U.S. 518. Mr. Justice Powell (joined by the Chief Justice and Mr. Justice Blackmun) dissented, saying that there are abundant op-

portunities for persons, who derive satisfaction from vocabularies depending upon obscenities, to gratify their tastes, but that such gratification must be private, without subjecting an unwilling audience to such experience. As Justice Powell put it, "our free society must be flexible enough to tolerate [filth and obscenities] provided it occurs without subjecting unwilling audiences to . . . verbal abuses. . . ." [92 S.Ct. at 2483].

In *Rosenfeld*, appellant was convicted for using the adjective "M - - - - F - - - -" on four occasions to describe various school officials while addressing a public school board meeting attended by about 150 people, approximately 40 of which were children and about 25 of which were women. The dissenters felt that the exception to First Amendment protection recognized in *Chaplinsky v. New Hampshire*, 315 U.S. 568, "extends to the wilful use of scurrilous language calculated to offend the sensibilities of an unwilling audience" [92 S.Ct. at 2484]. (Emphasis added). Mr. Justice Powell cited with approval *Williams v. District Court*, 136 U.S. App.D.C. 56, 419 F.2d 638 (1969), where it was stated that "[t]he fact that a person may constitutionally indulge his taste for obscenities in private does not mean that he is free to intrude them upon the attentions of others".

B. Petitioner, a bookseller, has standing to assert the right of an adult to read a book of his choice, including an obscene book. In *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, the Court addressed itself to Baird's "standing to assert the rights of unmarried persons" denied access to contraceptives [92 S.Ct. at 1033]. After stating that Baird had sufficient interest to satisfy the "Case or Controversy" requirement of Article III of the Constitution, the Court held that

Baird had standing because "the relationship between Baird and those whose rights he seeks to assert is not simply that between a distributor and potential distributees, but that between an advocate of the rights of persons to obtain contraceptives and those desirous of doing so". The Court found that if Baird were denied standing, the fundamental personal rights involved in that case would be violated or adversely affected. The Court emphasized the need to relax its rule "against the assertion of third-party rights" to protect the important interests at stake. Observing that enforcement of the Massachusetts statute would materially impair the ability of single persons to obtain contraceptives, the Court stated that Baird's standing to assert third-party rights was stronger than the claim made in *Griswold* "because unmarried persons denied access to contraceptives in Massachusetts, unlike the users of contraceptives in Connecticut, are not themselves subject to prosecution and, to that extent, are denied a forum in which to assert their own rights." [92 S.Ct. at 1034]. Petitioner herein has even a stronger claim than did Baird to assert "third-party rights". Like Baird, petitioner "is now in a position, and plainly has an adequate incentive" to assert the right to read. Moreover, petitioner was convicted for engaging in "pure" communication. Cf. *Cohen v. California*, 403 U.S. 15 with *United States v. O'Brien*, 39 U.S. 367. [W]e deal here with a conviction resting solely upon 'speech', . . . not upon any separately identifiable conduct. . . ." *Cohen v. California*, 403 U.S. at 18. In *Lovell v. Griffin*, 303 U.S. 444, 452, Chief Justice Hughes stated that "[t]he press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion". He then emphasized that distribution is

as essential to freedom of press as is publication. Without such distribution, publication would be of little value. *Ex Parte Jackson*, 96 U.S. 727, 733. Petitioner herein has standing, *inter alia*, because to deny such standing "would have an intolerable inhibitory effect on freedom of speech". *Eisenstadt v. Baird*, 92 S.Ct. at 1034, n.5.

C. Petitioner, in claiming standing to assert the right of an adult to read what he chooses, does not challenge the ruling in *Roth v. United States*, 354 U.S. 476, that obscenity may be regulated by the States. In this case, petitioner seeks no blanket immunization to deal with "obscenity" in any way he likes. Petitioner recognizes that *Roth* and its progeny hold that obscenity is not "speech",⁴ protected by the First and Fourteenth Amendments, and may be controlled by the State. But where, as here, an adult has the right to receive and read a book, the power of the State to interfere with this right, by punishing the bookseller, is limited. State regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms. *N.A.A.C.P. v. Alabama*, 377 U.S. 288, 307. As Mr. Justice White stated in

⁴Judge Irving Kaufman, after observing that the Court held in *Roth* that obscenity is not speech, stated:

"If obscenity is not speech then what is it? I would not be giving away a big secret to state that efforts to make *that* determination have not been remarkably successful up until now. I am certainly not attempting to have any fun at the Supreme Court's expense. I cannot myself offer anything of value toward formulating that inconceivably difficult definition. . . . Given the complexity of both communication and people, such a definition—of obscenity—may be beyond the power of discursive language."

(11 Annual James Madison Lecture, New York Law Journal, April 1, 1970). [Emphasis in original].

Griswold v. Connecticut, 381 U.S. 479, 503-504, when a State seeks to interfere with fundamental personal rights, it "bears a substantial burden of justification when attacked under the Fourteenth Amendment. . . . 'Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling.'"

In *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, the Court, relying on the Equal Protection Clause, expanded the right to "use" contraceptives, protected by the right of marital privacy, to cover the right to distribute contraceptives to an unmarried woman.

"If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. . . ." [92 S.Ct. at 1038]. [Emphasis in original].

Mr. Justice White, with whom Mr. Justice Blackmun concurred, assumed that the statute could have been constitutionally applied if there were a sufficient showing in the record of a compelling state interest. Mr. Justice White stated: "Had Baird distributed a supply of the so-called 'pill,' I would sustain his conviction

under this statute. . . . Baird, however, was found guilty of giving away vaginal foam. Inquiring into the validity of this conviction does not come to an end merely because some contraceptives are harmful and their distribution may be restricted. . . ." Where the restriction burdens fundamental personal rights, "we may not accept on faith the State's classification of a particular contraceptive as dangerous to health. Due regard for protecting constitutional rights requires that the record contain evidence that a restriction on distribution of vaginal foam is essential to achieve the statutory purpose, or the relevant facts concerning the product must be such as to fall within the range of judicial notice." [92 S.Ct. at 1043]. Since neither requirement was met, Justice White joined the majority. "[T]o sanction a medical restriction upon distribution of a contraceptive not proved hazardous to health would impair the exercise of the constitutional right. . . . [A] conviction cannot stand where the 'record fail(s) to prove that the conviction was not founded upon a theory which could not constitutionally support the verdict.' . . ." [92 S.Ct. at 1044].

Stanley set forth the legitimate state interests in controlling the distribution of obscenity: distribution to minors, or the thrusting of the material upon an unwilling public. Neither of those conditions exist in the case at bar. The record establishes conclusively that the sale herein was solely to a consenting adult. It follows, it is respectfully submitted, that the State may not interfere with the right of the adult to read or view what he chooses by punishing petitioner herein, a book-seller, for selling a book under conditions which do not trench upon any legitimate state interests.

II.

Respondent Has Failed to Establish a Compelling Reason, or Even a Rational Basis, for Interfering With the Fundamental Right of an Adult to Read or View Whatever He Chooses.

A. Petitioner argued that a book has a different impact, "varying according to the part of the community it reached", and "depending upon the setting in which it is placed" (Pet. Br., 28). Petitioner further argued that where, as here, a book is sold to a consenting adult, not a minor's and is not thrust upon an unwilling audience, the book is not obscene, although it might be obscene if sold to minors or thrust upon an unwilling audience (Pet. Br., 36-53).

Respondent addressed itself only peripherally to this argument. Respondent's basic argument (Resp. Br., Point II) is that "state regulation is proper and necessary" even when "obscene" publications are "sold to an adult instead of to a child, or forced on an unwilling adult" (Resp. Br., 28). Petitioner here addresses himself to respondent's argument that the State is free to interfere with an adult's "right to read" provided it acts rationally."

B. Respondent cites *Ginsberg v. New York*, 390 U.S. 629, to support its assertion that "merely because a state may bar distribution to children of books deemed suitable for adults does not mean, as petitioner contends, that the state may not reasonably restrict the sale of obscene matter by virtue of the fact that the sales are not to children" (Resp. Br., 28-29). While the meaning of this statement is not clear, respondent

⁷This Point, as briefed by respondent and answered by petitioner, is intimately linked with the argument presented in Point I.

seems to argue that the State may constitutionally bar an adult from receiving an "obscene" publication if it acts rationally. *Ginsberg* did hold that a state statute that barred minors from receiving publications which are obscene on the basis of their appeal to minors had a rational relation to the objective of safeguarding such minors and was not unconstitutional. The Court held that New York could accord minors "a more restricted right than that assured to adults to judge and determine for themselves what sex material they may read or see". The Court could not say "that the statute invades the area of freedom of expression constitutionally secured to minors". [390 U.S. at 637]. Relying on *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, the Court stated that "constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic to the structure of our society" [390 U.S. at 639]. The Court held that since "obscenity is not protected expression and may be suppressed without a showing of the circumstances which lie behind the phrase 'clear and present danger' in its application to protected speech", state power "requires only that we be able to say that it was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors" [390 U.S. at 641].

In the case at bar, we are dealing with the rights of adults to read, not with the rights of minors. As Mr. Justice Stewart suggested in his concurring opinion in *Ginsberg*, a minor does not have the same "right to read" as an adult. The First Amendment, he said, secures "the liberty of each man to decide for himself what he will read and to what he will listen. The Constitution guarantees, in short, a society of free

choice." [390 U.S. at 649]. Justice Stewart was of the view that minors were "not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees. It is only upon such a premise, I should suppose, that a state may deprive children of other rights—the right to marry, for example, or the right to vote—deprivations that would be constitutionally intolerable for adults." [390 U.S. at 650].

It is one thing to say, as the Court did in *Ginsberg*, that the State may prohibit the sale of an "obscene" publication to a minor, upon a showing of "reasonableness", but quite another thing to say that an adult's "right to read" may be denied on a similar showing. The adult's right to read stands on a higher footing and may only be denied by a clear showing that there is a compelling state interest justifying such denial. In the case at bar, the State made no such showing. Indeed, the State has not even made out a case that it is "reasonable" to interfere with the adult's right to read what he chooses.

Respondent argues that it is "reasonable" to interfere with the right of an adult to read "obscenity", because "legalizing distribution to adults would certainly cause an increase in juvenile possession through redistribution. Respondent does . . . say . . . that allowing free and easy distribution to adults would of necessity result in less protection from exposure to juveniles." (Resp. Br., 36).

Respondent's argument, in effect, calls for the overruling of *Butler v. Michigan*, 352 U.S. 380. In *Butler*, the Court unanimously struck down a Michigan obscenity law that made it an offense for a bookseller "to make available for the general reading public . . .

a book . . . found to have a potentially deleterious influence upon youth" [352 U.S. at 382-383]. In *Butler*, as in the case at bar, the book was in fact sold to a police officer. Michigan argued, as respondent does in the case at bar, that it was "reasonable" to quarantine "the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence. . . ." [352 U.S. at 383].

In striking down the Michigan statute, Mr. Justice Frankfurter stated:

"We have before us legislation not reasonably restricted to the evil with which it is said to deal. The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children. It thereby arbitrarily curtails one of those liberties of the individual, now enshrined in the Due Process Clause of the Fourteenth Amendment, that history has attested as the indispensable conditions for the maintenance and progress of a free society. . . ." [352 U.S. at 383-384].

In *Stanley*, the Court rejected the State's argument "that prohibiting of possession of obscene materials is a necessary incident to statutory schemes prohibiting distribution". The Court stated that it was not convinced that such difficulties exist, "but even if they did we do not think that they would justify infringement of the individual's right to read or observe what he pleases." [394 U.S. at 567-568].

Respondent also argues that petitioner should not be "trusted to sell to minors and not to intrude on the public" (Resp. Br., 37). Of course, petitioner never argued that he should be "trusted not to sell to minors or

to intrude on the public". Petitioner did argue that he, and other booksellers, could be reached by the criminal law if there were a sale to minors or an intrusion on the public [Pet. Br., 53-55]. If the State alleges in its accusatory pleading, and proves, that petitioner sold an "obscene" book to a minor or thrust such a book upon an unwilling public, the State is free to punish petitioner. See, *United States v. Vuitch*, 402 U.S. 62. On the other hand, the State may not constitutionally punish petitioner for selling a book to a consenting adult because respondent speculates that petitioner may in the future sell a similar book to "a child, or . . . peddle . . . door-to-door" (Resp. Br., 28). Fundamental constitutional rights may not be denied upon such flights of fancy.

Respondent "wonders" if freedom of speech protects the sale of sexually explicit matter "from newspaper vending machines up and down the sidewalks" (Resp. Br., 37), although petitioner had made no argument in favor of such sales on sidewalks. Finally, respondent says, without further explanation, that "petitioner is playing with a loaded gun" (Resp. Br., 38). If respondent means that the right of freedom of speech and press protected by the First Amendment is "dangerous", the simple answer is that that fact was known to our Founding Fathers, who chose to accept that danger rather than accept tyranny. If respondent means by its statement that petitioner's sale of an "obscene" book to a consenting adult is a threat to the Republic, respondent has failed to make its case. The threat to the Republic comes not from the petitioner but from lawless conduct of law enforcement officials enforcing "thought control" laws. See, e.g., *Dyson v. Stein*, 401 U.S. 200; *Aday v. Municipal Court*, 210 Cal.App.2d

229, 26 Cal.Rptr. 576 (1962); *Cinema Classics Ltd. v. Busch*, 339 F.Supp. 43 (1972).

In *Dyson v. Stein*, 401 U.S. 200, 204, Mr. Justice Douglas graphically describes two nighttime obscenity raids as "search-and-destroy missions in the Vietnamese sense of the phrase". After stating that it would be difficult to find in our books a more lawless search-and-destroy raid, Mr. Justice Douglas stated:

"... If this search-and-destroy technique can be employed against this Dallas newspaper, then it can be done to the New York Times, the Washington Post, the Seattle Post Intelligencer, the Yakima Herald-Republic, the Sacramento Bee, and all the rest of our newspapers. . . ." [401 U.S. at 206].

In *Aday v. Municipal Court*, 210 Cal.App.2d 229, 26 Cal.Rptr. 576 (1962), Los Angeles law enforcement officials seized, under the California obscenity law, some 400,000 books. After condemning the seizure as a flat and flagrant violation of constitutional rights, by those sworn to uphold the law, the Court said:

"... [W]e are required to remember that when government itself becomes lawbreaker the foundations of our freedoms are weakened, and unless official oppressors are restrained those foundations may completely collapse." [26 Cal.Rptr. at 589].

Eight months ago, a three-judge statutory Federal Court was called upon to make a similar pronouncement after finding that local law enforcement officials had, in the name of enforcing the obscenity laws, engaged in raids and seizures "for the twin purposes of

putting petitioners out of business and censoring and preventing the circulation of great quantities of sexually oriented, pictorial materials". *Cinema Classics Ltd. v. Busch*, 339 F.Supp. 43 (1972). After finding that the indiscriminate seizure of over 15,000 reels of motion picture films and the indiscriminate seizure of business records amounted to "harassment" and "bad faith" law enforcement, in violation of rights secured by the Federal Constitution, the court said:

"The censor and the illegal police raiding party are even less welcome in this country than the peddler of execrable sex materials, and with good cause. If such activity as appears in the instant case is not promptly rebuked and redressed, who will call an eventual halt, and where will it be called, when the civil liberties of all the citizens become more and more eroded in the name of 'decency?' " [339 F.Supp. at 51].

Within the last two (2) months, the District Attorney of the County of Los Angeles dusted off California's 60-year-old Red Light Abatement Law to close down a publishing company and two companies distributing books and magazines. The building, consisting of approximately 115,000 sq. ft., was padlocked, and more than three million (3,000,000) books and magazines were impounded, on the theory that the publishing activities made the premises a house of prostitution. *People and Busch v. American Art Enterprises, Inc. etc. et al.*, Superior Court of the State of California in and for the County of Los Angeles, No. C-37091.⁶ The lawless conduct just recounted, engaged

⁶As the article in the September 26, 1972 issue of the Van Nuys News reveals (see Appendix A), California appellate courts frustrated this attempt to suppress "obscenity" by violating consti-

in "in the name of decency", is, it is respectfully submitted, a threat to the rule of law itself. Perhaps such infringements were inevitable once the Court opened the door "the slightest crack". *Roth v. United States*, 354 U.S. 476, 488. In *Smith v. California*, 361 U.S. 147, 160, the Court warned that "illegitimate and unconstitutional practices bet their first footing" when the attack is made on some thing or person deemed "obnoxious". It is the duty of courts. Mr. Justice Black stated, "to be watchful for the constitutional rights of the citizens and against any stealthy encroachments thereon". Justice Black returned to the same theme, dissenting in *United States v. 37 Photographs* and *United States v. Reidel*, 402 U.S. 363, 388. He there warned against "bowing to popular passions" and to what appears to be "the temper of the times", saying:

"... In any society there come times when the public is seized with fear and the importance of basic freedoms is easily forgotten. . . ."

More recently, the Chief Justice of the California Supreme Court felt called upon to make a similar observation. Wright, "The Role of the Judiciary: From Marbury to Anderson", 60 Calif.L.Rev. 1262, 1267-1268 (September 1972).

tutional rights. *American Art Enterprises, etc., et al. v. Superior Court*, Court of Appeal of the State of California, Second Appellate District, 2d Civ. No. 40950.

"Every time an obscenity case is to be argued here, my office is flooded with letters and postal cards urging me to protect the community or the Nation by striking down the publication. The messages are often identical even down to commas and semicolons. The inference is irresistible that they are all copied from a school or church blackboard. Dozens of postal cards often are mailed from the same precinct. The drives are incessant and the pressures are great. Happily we do not bow to them. . . ." *Memoirs v. Massachusetts*, 383 U.S. 413, 427-428 (Mr. Justice Douglas concurring).

It is not yet time to recognize that "obscenity" is speech, entitled to First Amendment protection, it surely is time to put an end to the "witch hunts" conducted in the name of enforcing the obscenity laws.* Petitioner respectfully suggests that recognizing an adult's "right to read", and a bookseller's standing to enforce that right, will go a long way towards solving the "obscenity problem". Such recognition offers the best hope that the door barring federal and state intrusion into the area of freedoms of speech and press will be kept "tightly closed". *Roth v. United States*, 354 U.S. 476, 488.

Conclusion.

The judgment of the court below should be reversed.

Respectfully submitted,

STANLEY FLEISHMAN,
DAVID M. BROWN,

Counsel for Petitioner.

SAM ROSENWEIN,
Of Counsel.

*In *United States v. Klaw*, 350 F.2d 155, 170, the Court emphasized the need, as this Court did in *Roth*, for tight appellate controls in obscenity cases. "Unless there be this protection, a witch hunt might well come to pass which would make the Salem tragedy fade into obscurity." The Court recognized how easy it was for a prosecutor "to stand before a jury, display the exhibits involved, and merely ask in summation: 'Would you want your son or daughter to see or read this stuff?' A conviction in every instance would be virtually assured." See also, *United States v. Vuitch*, 402 U.S. 62, 79-80 (Mr. Justice Douglas, dissenting).

APPENDIX A.

The News.

HIGH COURT REJECTS BUSCH ANTI-PORNOGRAPHY ACTION

**Refusal to Hear Case Means 3 Million
Books Now Can Be Released for Sale**

Three million alleged pornographic books now can be removed from a Chatsworth building as the result of the State Supreme Court's refusal yesterday to hold a hearing in the matter.

The books are part of a civil law suit filed by Dist. Atty. Joseph B. Busch against 30 defendants under the California Red Light Abatement Act.

One of the principal defendants in the suit is Milton Luros, whom Busch has described as the "biggest pornography publisher in Southern California."

Previous Ruling

Busch's office was notified yesterday afternoon by the clerk of the Supreme Court in San Francisco that justices had denied the prosecution's request for the hearing.

The denial allows an appellate court ruling releasing the books to stand and the books could have been removed at any time after 5 p.m. yesterday.

The appellate court, which ruled last week, stayed its own order until 5 p.m. yesterday to allow Busch to appeal to the State Supreme Court.

According to Dep. Dist. Atty. Donald Kaplan, the refusal of the Supreme Court to hold a hearing means the books are no longer under court jurisdiction and can be removed by the defendants if they choose to do

Injunction Previously

Busch contends the location where the books are stored—21300 Lassen St.—is the headquarters for acts of prostitution which occur elsewhere and which are photographed for inclusion in some of the books.

Superior Court Judge Robert A. Wenke last Sept. 11 issued a preliminary injunction which among other things barred removal of the books from the Lassen St. premises.

Last week, the Appellate Court stayed the injunction, except for a portion which prohibits any lewd or unlawful acts being conducted on or from the premises.

On the same day the first stay was issued, the same Appellate Court granted Busch until 5 p.m. yesterday to challenge the ruling.

"Will Be Circulated"

Stanley Fleishman, one of the attorneys for the defendants, hailed the Supreme Court's action in denying a hearing.

Concerning what will be done with books, Fleishman said:

"They will be circulated as they have in the past—lawfully throughout the nation. They are not obscene by standards announced by the U.S. Supreme Court and a California Supreme Court in countless cases."

The attorneys said that from the beginning he had contended the District Attorney was engaged in an illegal attempt to censor the press."

Cites Constitution

He noted that six months ago a Federal Court ruled that the District Attorney "was engaged in bad faith law enforcement in his attempt to suppress books and magazines which were protected by the free speech and press provisions of the constitution.

According to Fleishman, the California Supreme Court's ruling, "reminds us again that the Constitution is for all people and not just for those who may be popular at a particular time. The Constitution protects the unpopular just as surely as it protects the popular."

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 300 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

KAPLAN v. CALIFORNIA

CERTIORARI TO THE APPELLATE DEPARTMENT OF THE
SUPERIOR COURT FOR THE COUNTY OF LOS ANGELES

No. 71-1422. Argued October 19, 1972—Decided June 21, 1973

Petitioner, a proprietor of an "adult" bookstore, was convicted of violating a California obscenity statute by selling a plain-covered unillustrated book containing repetitively descriptive material of an explicitly sexual nature. Both sides offered testimony as to the nature and content of the book, but there was no "expert" testimony that the book was "utterly without redeeming social importance." The trial court used a state community standard in applying and construing the statute. The appellate court, affirming, held that the book was not protected by the First Amendment. *Held*:

1. Obscene material in book form is not entitled to First Amendment protection merely because it has no pictorial content. A State may control commerce in such a book, even distribution to consenting adults, to avoid the deleterious consequences it can reasonably conclude (conclusive proof is not required) result from the continuing circulation of obscene literature. See *Paris Adult Theatre I v. Slaton*, ante, p. —. Pp. 3-5.

2. Appraisal of the nature of the book by "the contemporary community standards of the State of California" was an adequate basis for establishing whether the book here involved was obscene. See *Miller v. California*, ante, p. —. Pp. 6-7.

3. When, as in this case, material is itself placed in evidence, "expert" state testimony as to its allegedly obscene nature, or other ancillary evidence of obscenity, is not constitutionally required. *Paris Adult Theatre I v. Slaton*, supra. Pp. 6-7.

4. The case is vacated and remanded so that the state appellate court can determine whether the state obscenity statute satisfies

Syllabus

the constitutional standards newly enunciated in *Miller, supra*.
Pp. 7-8.

23 Cal. App. 3d Supp. 9, 100 Cal. Rptr. 372, vacated and remanded.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., would vacate and remand for dismissal of the criminal complaint. BRENNAN, J., filed a dissenting opinion, in which STEWART and MARSHALL, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 71-1422

Murray Kaplan, Petitioner,
v.
State of California.

On Writ of Certiorari to the
Appellate Department of
the Superior Court of
California for the County
of Los Angeles.

[June 21, 1973]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to the Appellate Department of the Superior Court of California for the County of Los Angeles to review the petitioner's conviction for violation of California statutes regarding obscenity.

Petitioner was the proprietor of the Peek-A-Boo Bookstore, one of the approximately 250 "adult" bookstores in the City of Los Angeles, California.¹ On May 14, 1969, in response to citizen complaints, an undercover police officer entered the store and began to persue several books and magazines. Petitioner advised the officer that the store "was not a library." The officer then asked petitioner if he had "any good sexy books." Petitioner replied that "all of our books are sexy" and exhibited a lewd photograph. At petitioner's recommendation, and

¹ The number of these stores was so estimated by both parties at oral argument. These stores purport to bar minors from the premises. In this case there is no evidence that petitioner sold materials to juveniles. Cf. *Miller v. California*, — U. S. — (pp. 1-3) (1973).

after petitioner had read a sample paragraph, the officer purchased the book *Suite 69*. On the basis of this sale, petitioner was convicted by a jury of violating California Penal Code § 311.2,² a misdemeanor.

The book, *Suite 69*, has a plain cover and contains no pictures. It is made up entirely of repetitive descriptions of physical, sexual conduct, "clinically" explicit and offensive to the point of being nauseous; there is only the most tenuous "plot." Almost every conceivable

² The California Penal Code § 311.2, at the time of the commission of the alleged offense, read in relevant part:

"(a) Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution or in this state prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter, is guilty of a misdemeanor. . . ."

California Penal Code § 311, at the time of the commission of the alleged offense, provided as follows:

"As used in this chapter:

"(a) 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i. e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance.

"(b) 'Matter' means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

"(c) 'Person' means any individual, partnership, firm, association, corporation, or other legal entity.

"(d) 'Distribute' means to transfer possession of, whether with or without consideration.

"(e) 'Knowingly' means having knowledge that the matter is obscene."

variety of sexual contact, homosexual and heterosexual, is described. Whether one samples every fifth, 10th, or 20th page, beginning at any point or page at random, the content is unvarying.

At trial both sides presented testimony, by persons accepted to be "experts," as to the content and nature of the book. The book itself was received in evidence, and read, in its entirety, to the jury. Each juror inspected the book. But the State offered no "expert" evidence that the book was "utterly without socially redeeming value," nor any evidence of "national standards."

On appeal, the Appellate Department of the Superior Court of California for the County of Los Angeles affirmed petitioner's conviction. Relying on the dissenting opinions in *Jacobellis v. Ohio*, 378 U. S. 184, 199, 203 (1964), and JUSTICE WHITE's dissent in *Memoirs v. Massachusetts*, 383 U. S. 413, 462 (1966), it concluded that evidence of a "national" standard of obscenity was not required. It also decided that the State did not always have to present "expert" evidence that the book lacked "redeeming social value," and that, "in light . . . of the circumstances surrounding the sale" and the nature of the book itself, there was sufficient evidence to sustain petitioner's conviction. Finally, the state court considered petitioner's argument that the book was not "obscene" as a matter of constitutional law. Pointing out that petitioner was arguing, in part, that all books were constitutionally protected in an absolute sense, it rejected that thesis. On "independent review," it concluded "Suite 69 appeals to the prurient interest in sex and is beyond the customary limits of candor within the State of California." It held that the book was not protected by the First Amendment. We agree.

This case squarely presents the issue of whether expression by words alone can be legally "obscene" in the sense

of being unprotected by the First Amendment.² When the Court declared that obscenity is not a form of expression protected by the First Amendment, no distinction was made as to the medium of the expression. See *Roth v. United States*, 354 U. S. 476, 481-485 (1957). Obscenity can, of course, manifest itself in conduct, in the pictorial representation of conduct, or in the written and oral description of conduct. The Court has applied similarly conceived First Amendment standards to moving pictures, to photographs, and to words in books. See *Freedman v. Maryland*, 380 U. S. 51, 57 (1965); *Jacobellis v. Ohio*, 378 U. S. 184, 187-188 (1964); *Times Film Corp. v. Chicago*, 365 U. S. 43, 46 (1961); *id.*, 365 U. S., at 51 (Warren, C. J., dissenting); *Kingsley International Pictures Corp. v. Regents*, 360 U. S. 684, 689-690 (1959);

² This Court, since *Roth v. United States*, 354 U. S. 476 (1957), has only once held books to be obscene. That case was *Mishkin v. New York*, 383 U. S. 502 (1966), and the books involved were very similar in content to *Suite 69*. But most of the *Mishkin* books, if not all, were illustrated. See 383 U. S., at 505, 514-515. Prior to *Roth*, this Court affirmed, by an equally divided Court, a conviction for sale of an unillustrated book. *Doubleday & Co., Inc. v. New York*, 335 U. S. 848 (1948). This Court has always rigorously scrutinized judgments involving books for possible violation of First Amendment rights, and has regularly reversed convictions on that basis. See *Childs v. Oregon*, 401 U. S. 1006 (1971), *Walker v. Ohio*, 398 U. S. 434 (1967); *Keney v. New York*, 388 U. S. 440 (1967); *Friedman v. New York*, 388 U. S. 441 (1967); *Sheperd v. New York*, 388 U. S. 444 (1967); *Avansino v. New York*, 388 U. S. 446 (1967); *Corinth Publications, Inc. v. Wesberry*, 388 U. S. 448 (1967); *Books, Inc. v. United States*, 388 U. S. 449 (1967); *A Quantity of Copies of Books v. Kansas*, 388 U. S. 482 (1967); *Redrup v. New York*, 386 U. S. 767 (1967); *Memoirs v. Massachusetts*, 383 U. S. 413 (1966); *Tralins v. Gerstein*, 378 U. S. 576 (1964); *Grove Press, Inc. v. Gerstein*, 378 U. S. 577 (1964); *Quantity of Copies of Books v. Kansas*, 378 U. S. 205 (1964); *Marcus v. Search Warrant*, 367 U. S. 717 (1961); *Smith v. California*, 361 U. S. 147, (1959); *Kingsley Books, Inc. v. Brown*, 354 U. S. 436 (1957).

Superior Films, Inc. v. Dept. of Education, 346 U. S. 587, 589 (1954) (DOUGLAS, J., concurring); *Joseph Burstyn, Inc. v. Wilson*, 343 U. S. 495, 503 (1952).

Because of a profound commitment to protecting communication of ideas, any restraint on expression by way of the printed word or in speech stimulates a traditional and emotional response, unlike the response to obscene pictures of flagrant human conduct. A book seems to have a different and preferred place in our hierarchy of values, and so it should be. But this generalization, like so many, is qualified by the book's content. As with pictures, films, paintings, drawings, and engravings, both oral utterance and the printed word have First Amendment protection until they collide with the long-settled position of this Court that obscenity is not protected by the Constitution. *Miller v. California*, — U. S. — (pp. 8-10) (1973). *Roth v. United States*, *supra*, 354 U. S., at 483-485 (1957).

For good or ill, a book has a continuing life. It is passed hand to hand, and we can take note of the tendency of widely circulated books of this category to reach the impressionable young and have a continuing impact.⁴ A State could reasonably regard the "hard core" conduct described by *Suite 69* as capable of encouraging or causing antisocial behavior, especially in its impact on young people. States need not wait until behavioral experts or educators can provide empirical data before enacting controls of commerce in obscene materials unprotected by the First Amendment or by a constitutional right to privacy. We have noted the power of a legislative body to enact such regulatory laws on the basis of unprovable assumptions. See *Paris Adult Theatre I v. Slaton*, *supra*, — U. S., at — (pp. 11-14) (1973).

⁴ See *Paris Adult Theatre I v. Slaton*, *supra*, — U. S. — (pp. 8-9, n. 6) (1973); Report of the Commission on Obscenity and Pornography (1970 ed.), at 401 (Hill-Link Minority Report).

Prior to trial, petitioner moved to dismiss the complaint on the basis that sale of sexually oriented material to consenting adults is constitutionally protected. In connection with this motion only, the prosecution stipulated that it did not claim that petitioner either disseminated any material to minors or thrust it upon the general public. The trial court denied the motion. Today, this Court, in *Paris Adult Theatre I v. Slaton*, *supra*, — U. S., at — (pp. 18-20) (1973), reaffirms that commercial exposure and sale of obscene materials to anyone, including consenting adults, is subject to state regulation. See also *United States v. Orito*, — U. S. — (pp. 3-6) (1973); *Twelve 200-ft. Reels*, — U. S. — (p. 5) (1973); *United States v. Thirty-Seven Photographs*, 402 U. S. 363, 376 (opinion of WHITE, J.) (1971); *United States v. Reidel*, 402 U. S. 351, 355-356 (1971). The denial of petitioner's motion was, therefore, not error.

At trial the prosecution tendered the book itself into evidence and also tendered, as an expert witness, a police officer in the vice squad. The officer testified to extensive experience with pornographic materials and gave his opinion that *Suite 69*, taken as a whole, predominantly appealed to the prurient interest of the average person in the State of California, applying contemporary standards, and that the book went "substantially beyond customary limits of candor in the State of California." The witness explained specifically how the book did so, that it was a purveyor of perverted sex for its own sake. No "expert" state testimony was offered that the book was "obscene under national standards," or that the book was "utterly without redeeming social importance," despite "expert" defense testimony to the contrary.

In *Miller v. California*, *supra*, the Court today holds that "the contemporary community standards of the

State of California," as opposed to "national standards," are constitutionally adequate to establish whether a work is obscene. We also reject in *Paris Adult Theatre I v. Slaton*, *supra*, any constitutional need for "expert" testimony on behalf of the prosecution, or for any other ancillary evidence of obscenity, once the allegedly obscene materials themselves are placed in evidence. *Paris Adult Theatre I*, *supra*, — U. S., at — (pp. 6-7) (1973). The defense should be free to introduce appropriate expert testimony, see *Smith v. California*, 361 U. S. 147, 164-165 (1959) (Frankfurter, J., concurring), but in "the cases in which this Court has decided obscenity questions since *Roth*, it has regarded the materials as sufficient in themselves for the determination of the question." *Ginzburg v. United States*, 383 U. S. 463, 465 (1966). See *United States v. Groner*, — F. 2d — (slip opinion pp. 2-20) (May 22, 1973) (CA5 1973). On the record in this case, the prosecution's evidence was sufficient, as a matter of federal constitutional law, to support petitioner's conviction.⁶

Both *Miller v. California*, *supra*, and this case involve California obscenity statutes. The judgment of the Appellate Department of the Superior Court of California for the County of Los Angeles is vacated, and the case remanded to that court for further proceedings not inconsistent with this opinion, *Miller v. California*, *supra*, and *Paris Adult Theatre I v. Slaton*, *supra*. See *United*

⁶ As the prosecution's introduction of the book itself into evidence was adequate, as a matter of federal constitutional law, to establish the book's obscenity, we need not consider petitioner's claim that evidence of pandering was wrongly considered on appeal to support the jury finding of obscenity. Petitioner's additional claims that his conviction was affirmed on the basis of a "theory" of "pandering" not considered at trial and that he was subjected to retroactive application of a state statute are meritless on the record.

States v. Twelve 200-ft. Reels, supra, — U. S., at — (p. 7, n. 7) (1973), decided today.

Vacated and remanded for further proceedings.

MR. JUSTICE DOUGLAS would vacate and remand for dismissal of the criminal complaint under which petitioner was found guilty because "obscenity" as defined by the California courts and by this Court is too vague to satisfy the requirements of due process. See *Miller v. California, ante*, — (dissenting opinion).

SUPREME COURT OF THE UNITED STATES

No. 71-1422

Murray Kaplan, Petitioner,
v.
State of California.

On Writ of Certiorari to the
Appellate Department of
the Superior Court of
California for the County
of Los Angeles.

[June 21, 1973]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

I would reverse the judgment of the Appellate Department of the Superior Court of California and remand the case for further proceedings not inconsistent with my dissenting opinion in *Paris Adult Theatre v. Slaton*, ante. See my dissent in *Miller v. California*, ante.

Supreme Court of the United States

October Term, 1975

SUBJECT INDEX

	Page
Petition for Rehearing	1
Conclusion	14

TABLE OF AUTHORITIES CITED

Butler v. Michigan, 352 U.S. 380	3
Cohen v. California, 403 U.S. 15	9
Freedman v. Maryland, 380 U.S. 51	7
Stanley v. Georgia, 394 U.S. 557	4, 5
United States v. O'Brien, 381 U.S. 367	3

Statutes

United States Constitution, First Amendment..	7, 8, 13
United States Constitution, Fourth Amendment ..	5

IN THE
Supreme Court of the United States

October Term, 1971

No. 71-1422

MURRAY KAPLAN,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR REHEARING.

Petitioner respectfully presents this Petition for Rehearing based upon the following grounds:

1a. No member of the Court disagrees that, at a minimum, an adult has a fundamental personal right to read or view anything he chooses in his home. Nor does the Court contend that this right is unimpaired when a bookseller is punished for selling a book to an adult who requested the book and purchased it for his personal, private use. Nevertheless, the Court inexplicably rejects Petitioner's conclusion that such interference with a fundamental personal right cannot be upheld in the absence of evidence in the record of a subordinating state interest which is compelling. Instead, the Court permits the abridgment of a fundamental right upon nothing more than the "unprovable assumptions" (Slip Opinion, 5) that a book sold to

an adult may eventually fall into the hands of minors to there encourage or cause antisocial behavior.¹

The Court's analysis in *Paris Adult Theatre I v. Slaton* of the state interests in "regulating the use of obscene material in local commerce and in all places of public accommodation" (Slip Opinion, 8) completely fails to answer the critical issues raised by Petitioner. The question is not whether there are any legitimate state interests in "regulating" obscenity, but rather whether any of these interests are sufficiently compelling to justify the infringement of an adult's fundamental right to read in private the book of his choice, and whether even compelling state interests could be satisfied as well by legislation narrowly restricted to the alleged evils. Indeed, even if the issue is perceived as one involving "conduct" embodying both speech and nonspeech elements, legislation restricting speech must be no broader than is essential to the furtherance of the state interests sought to be served by the legisla-

¹It is remarkable that the Court supports the rationality of these "unprovable assumptions" by reference to the minority report of Father Hill and Reverend Link who dissented from the majority report of the Commission on Obscenity and Pornography (1970). The majority report, recommending the repeal of all federal and state legislation restricting the distribution of explicit sexual materials to adults, was concurred in by 12 members of the 18-man Commission. The majority commissioners included the dean of a major law school, the chief judge of a state juvenile court, the director of a major university library, two psychiatrists specializing in children and youth, and other social scientists. The only dissenters were Father Hill, head of a censorship group called "Morality in Media," Reverend Link, a Methodist minister, Charles H. Keating, Jr., leader of another censorship organization, "Citizens for Decent Literature," and a former state Attorney General. Thus, the only governmental agency to ever undertake an extensive and thorough review of obscenity laws, including a two-year program of empirical research, overwhelmingly rejected the "unprovable assumptions" which the Court now relies upon as the "rational" basis for impairing constitutional rights.

tion. See, *United States v. O'Brien*, 381 U.S. 367, 377. Thus, if a State is concerned that an adult who purchases a book for his own private enjoyment might later give the book to a minor, the constitutionally sound solution is to prohibit adults from selling or giving such books to minors, and not to reduce the adult population to reading only those books which are suitable for minors.² See, *Butler v. Michigan*, 352 U.S. 380.

In *Paris*, the Court also speaks of state interests in the "quality of life," the "total community environment," and the "tone of commerce in the great city centers." (Slip Opinion, 9). While the precise content of these asserted state interests is not entirely clear, if the concern underlying these phrases is with garish or vulgar stores or theatres, the concern can be properly met with appropriate regulation of public advertising, the appearance of public buildings, and zoning. But Petitioner is at a loss to understand how these state interests are compromised by permitting an adult to purchase the book of his choice. Surely the Court did not mean to suggest that state interests in the "quality of life," the "total community environmental," or the "tone of commerce" could serve to justify censorship of obnoxious political, economic or religious writings or philosophies.

With regard to the alleged "arguable correlation between obscene material and crime" (*Paris*, Slip Opinion, 9), aside from the extremely doubtful existence of any such correlation (See, Report of the Commission on Obscenity and Pornography, p. 52), a far

²Indeed, California has enacted precisely such legislation. California Penal Code §313.1.

more persuasive correlation could be urged between writings which advocate the violent overthrow of the Government and action directed toward that end. Yet the Court has never doubted that such mere advocacy is anything less than fully protected from governmental suppression. The risk that books might encourage or cause antisocial behavior was well understood by the framers of our Constitution. But our founding fathers knew that governmental suppression of books is a far greater risk.

In short, once the Court recognized, as it did, that an adult has a fundamental personal right to read at home the book of his choice, the Court was required by long established constitutional doctrine to strike down any abridgment of that fundamental right unless the abridgment was necessary to serve a compelling state interest which could not be served by any less restrictive means. Instead, the Court analyzed the issue in terms of the "mere rationality" test ordinarily applied in the area of economic regulation not affecting fundamental rights. In doing so, Petitioner respectfully submits, the Court erred and a rehearing should be granted.

1b. For all of the reasons previously stated, the opinion of the Court is unsupportable even under the most narrow reading of *Stanley v. Georgia*, 394 U.S. 557. But Petitioner is firmly convinced that the Court has seriously erred in giving *Stanley* such a restrictive reading, both as a matter of constitutional law and public policy. To say that *Stanley* stands for nothing more than the proposition that "a man's home is his castle" (*Paris Adult Theatre*, Slip Opinion, 17) is patently untenable. There is nothing in the Court's decisions interpreting the Fourth Amendment's guarantee

against unreasonable searches and seizures to prohibit government officials from entering a man's home for the purpose of seizing his private collection of erotica, so long as the search and seizure is conducted pursuant to a validly issued search warrant or pursuant to a recognized exception to the requirement of obtaining a search warrant. The Fourth Amendment's protection of the sanctity of the home against unreasonable governmental intrusion says nothing about the validity or invalidity of state statutes prohibiting the mere private possession of obscenity. The privacy interest protected by the Court in *Stanley* was the privacy of mind and thought, the right of the individual to be free from governmental programs of thought control. In *Stanley*, the Court recognized that even the most "obscene" book or film may have genuinely serious value to the adult who desires to read or view it. To him, the book he wishes to read or the film he wants to see is neither "patently offensive" nor "prurient." To him it may provide a source of great emotional or intellectual satisfaction. It seems obvious that the protected interest in *Stanley* was not merely the home, but the communicative relationship between the medium of expression and the adult citizen desiring access to that medium of expression. Thus, just as "the constitutionally protected privacy of family, marriage, motherhood, procreation and child-rearing is not just concerned with a particular place, but with a protected intimate relationship" which "extends to the doctor's office, the hospital, the hotel room, or as otherwise required to safeguard the right to intimacy involved" (*Paris Adult Theatre*, Slip Opinion, 17, n.13), so the protected privacy of an adult's right to the intellectual and emotional satisfaction to be gained from reading

or viewing the material of his choice must necessarily extend to the bookstore and the theatre in order to safeguard the protected right.

The Court does not advance clarity of analysis by comparing bookstores and theatres, limited to adults and inoffensive to the sensibilities of the general public, to "a man and woman locked in a sexual embrace at high noon in Times Square" (*Paris Adult Theatre, Slip Opinion*, 17-18). Similarly, the Court does not illuminate any constitutional principle by saying that rights of expression and privacy may be abridged by the use of such labels as "commercial exploitation" or "places of public accommodation." That a motel room is a "place of public accommodation" for purposes of civil rights statutes no more affords Government the right to prohibit an adult from reading any book of his choice in his motel room than it permits government agents from entering his motel room without a search warrant. Nor do we suppose that the privacy rights recognized in *Griswold v. Connecticut*, *Eisenstadt v. Baird*, and *Roe v. Wade* were in any way affected by the "public" nature of a birth control clinic or a hospital, or by the "commercial exploitation" of birth control devices and medical services.

Petitioner is similarly perplexed by the Court's wide-ranging analogies between governmental suppression of books and films and regulation of securities, trading stamps, natural resources, bear-baiting, and the like. Petitioner never argued, nor does he believe, that booksellers should be any more immune from consumer protection legislation than should any other businessman. There is no constitutional question of freedom of expression or right of privacy involved in a prosecution of booksellers for conspiring to fix prices, or

falsely advertising the works of Jacqueline Suzanne to be those of Shakespeare. But this Court has said time and again, and indeed has reiterated in *Roaden v. Kentucky* and *Heller v. New York*, that Government cannot treat allegedly obscene books and films the same way it can treat trading stamps or heroin. The latter may be seized, confiscated and destroyed without regard to such procedural safeguards as are required by cases like *Freedman v. Maryland*, 380 U.S. 51. But allegedly obscene books and films cannot be so treated precisely because it is their communicative content which is at issue rather than the manner of their commercial exploitation. Governmental regulation of the content of communication, as distinct from its time, place or manner, cannot be analogized to state regulation of commercial and business affairs without jeopardizing long established constitutional doctrines.

Rather than dealing in broad and inappropriate analogies, a rehearing is necessary so that the Court may focus its inquiry upon the questions actually presented by Petitioner: The substantiality of alleged state interests in interfering with the right of adults to read or view any material that they choose under circumstances where minors are not involved and the privacy and sensibilities of the general public are not intruded upon, and whether such state interests as might exist can be adequately served by means short of the wholesale prohibition and suppression of "obscene" matter.

2. In rejecting the necessity for determining whether alleged obscenity appeals to the "prurient interest" or is "patently offensive" according to the standards of the Nation as a whole, the Court has seriously undermined the guarantees of the First Amendment

and has added even greater uncertainty to an already vague area of law. The Court recognizes that “[u]nder a national Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community” (*Miller*, Slip Opinion, 15). For this reason, presumably, the Court holds that these First Amendment limitations will be protected by “the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary” (*Miller*, Slip Opinion, 10). Yet the Court does not state on what basis such independent review is to be carried out. Since *Roth*, the Court has frequently reversed state findings of obscenity as inconsistent with federal constitutional guarantees. The Court insists that it will continue this necessary protective function. Yet surely the Court has in the past and must continue in the future to exercise its power of judicial review in accordance with national standards, for the Court has neither the knowledge nor the jurisdiction to review the judgments of state courts by anything other than the standards established by the Federal Constitution. Indeed, one measure of the content of the national standards with respect to alleged obscenity is the decisions of the Court holding particular material to be protected by the Constitution. It seems anomalous for the Court to tell the fifty states that each may judge alleged obscenity by its own state standards, but at the same time to hold, as it must, that the states’ determinations will be reviewed according to a national standard. When the Court reverses a state finding of obscenity, it is necessarily saying that the national Constitution forbids the suppression of that particular work anywhere in the Nation regardless of whether “[p]eople in different states vary in their tastes and

attitudes" (*Miller*, Slip Opinion, 19). By permitting the States, in the first instance, to judge alleged obscenity on the basis of their own standards is simply to encourage a proliferation of erroneous determinations by finders of fact which this Court will be obligated to correct. In the interim, however, constitutionally protected expression will be suppressed, perhaps for years.

In seeking to justify the use of such state standards, the Court points to alleged diversity in tastes and attitudes among the several States, and argues that "this diversity is not to be strangled by the absolutism of imposed uniformity" (*Miller*, Slip Opinion, 19). But the Court overlooks the fact that the truly significant diversity is not among the several States, but rather among individuals living side by side in every community in the land. With respect to whether a given work is perceived as being "patently offensive" or "prurient," individuals within any community will differ far more sharply than will the aggregate population in any one State as compared to any other. As Mr. Justice Harlan said in *Cohen v. California*, 403 U.S. 15, 25, "one man's vulgarity is another's lyric," and that mature observation far more aptly characterizes differences among particular individuals than among various polities.

Petitioner is no critic of diversity nor is he an advocate of "imposed uniformity." The national Constitution, after all, does not set the outer limits for freedom of expression in the several States. It does, however, set the outer limits for the suppression of freedom of expression. The national Constitution guarantees only the minimum content of freedom of expression, and no State has the power to reduce that mini-

mum content. Our Nation does enjoy a pluralistic society, but this laudable fact of diversity cannot rationally justify depriving the citizens of one State of expression which the Nation as a whole tolerates. Requiring judges and juries to apply national standards in this area cannot guarantee the absence of verdicts influenced by subjective personal prejudices or capriciousness. But insistence upon the use of national standards to judge alleged obscenity in any given community at least encourages recognition of the fact that the media of communication today are indeed national; the political, social, economic, and even sexual issues that confront us are, for the most part, national issues; and the use of national standards can at least minimize the risk that particular fact-finders will judge expression by subjective and parochial standards and, in so doing, deprive their own neighbors of freedom of choice.

No judge or jury can force another person to read a book or watch a film, they can only prevent another person from having the opportunity to do so. It is because judges and juries in obscenity cases have the power only to restrict access to expression, that their power must be circumscribed by minimum national standards of tolerance.

3. The Court held that there is no "constitutional need for 'expert' testimony on behalf of the prosecution, or for any other ancillary evidence of obscenity, once the allegedly obscene materials themselves are placed in evidence." (Slip Opinion, 7). Petitioner respectfully submits that this holding is contrary to First and Fourteenth Amendment principles, and further compounds the vagueness inherent in the new, as in the old, definition of "obscenity."

The Court advances two reasons in support of its holding, neither of which can withstand critical analysis. First, the Court rejects the need for expert evidence that challenged material is obscene because the materials "are the best evidence of what they represent." (*Paris*, Slip Opinion, 7). While it is indisputably true that the best evidence of the content of a work is the work itself, this statement of a rule of evidence completely fails to meet the question presented. In prosecutions for disseminating alleged obscenity, the content of the challenged work is virtually never at issue. Rather, the issue in all such prosecutions is whether the material satisfies each of the independent elements which must exist before a work can be found obscene consistent with the Constitution. The Court's reformulation of those three elements in *Miller* still requires the prosecution to prove not merely the contents of the challenged work, but also "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest. . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." (*Miller*, Slip Opinion, 9-10). By merely reciting the "best evidence rule," the Court avoids the real issue, which is whether the mere reading or viewing of a book or film can, standing alone, inform the trier of fact as to whether the material satisfies each of the three elements necessary to support a finding of obscenity. The naked assertion that "hard core pornography . . . can and does speak for itself" (*Paris*, Slip Opinion, 7, n. 6) hardly serves as

an adequate substitute for a reasoned analysis of the issue.

Secondly, the Court questions the appropriateness of the use of expert testimony by stating that "[s]uch testimony is usually admitted for the purpose of explaining to lay jurors what they otherwise could not understand No such assistance is needed by jurors in obscenity cases. . . ." (*Paris*, Slip Opinion, 7, n.6). The Court's position here is not only manifestly incorrect, but is contradictory to its statement in *Kaplan* that "[t]he defense should be free to introduce appropriate expert testimony, see *Smith v. California*, 361 U.S. 147, 164-165 (1959) (Frankfurter, J., concurring)" (Slip Opinion, 7). The fact is that lay jurors cannot, without expert assistance, determine whether any given work satisfies the standards for judging obscenity. It is unreasonable to assume that lay jurors are necessarily familiar with community standards of tolerance and whether material appeals to prurient interest when "judged by its impact on an average person." (*Miller*, Slip Opinion, 19). Application of these standards to particular works necessarily involves knowledge of the "social sciences which lay persons cannot be assumed to possess. Moreover, it is inherently contradictory to assert that jurors or judges can simply examine a book or film and, without more, determine that it lacks serious literary, artistic, political or scientific value. Without expert testimony, the standards for judging alleged obscenity become mere lingual abstractions, incapable of objective application. To permit the prosecution to discharge its burden of proof by nothing more than parading the material in front of a jury is to reduce obscenity trials to a sham.

When a book is placed in evidence, the only fact proven is the existence of the book. The conclusion that obscenity is not self-evident is established by the multitude of reversals by the Court of findings of obscenity made by judges, juries and appellate courts. Protection for nonobscene works can only be assured if the most sensitive tools are utilized to ascertain the dim and uncertain line between protected and unprotected speech. Expert testimony is one of the most important of these sensitive tools. Without it, judges and juries are left free to suppress speech and press based upon their own personal prejudices and subjective reactions, thereby reducing the rule of law to a matter of taste.

4. Finally, the Court denies First Amendment protection to the book involved in the present case describing it as, *inter alia*, "‘clinically’ explicit and offensive to the point of being nauseous" (Slip Opinion, 2). One must wonder whether a book's capacity to induce nausea in at least five members of the Court is the true measure of its constitutional protection. Nowhere does the Court attempt to distinguish this book from the host of other, similar books which the Court had previously held to be protected from governmental suppression. The failure of the Court to provide a reasoned analysis of why this book, unlike so many others, falls outside the embrace of the First Amendment, strongly suggests that the Court's newly formulated standards for judging obscenity are no less vague than the old. To persons engaged in the circulation of the press, there is no real guidance in the Court's opinions. If the Court's new standards are indeed "more concrete than those in the past" (*Miller*, Slip Opinion, 5), if the Court is now to "abandon the casual practice of *Redrup v. New*

York law, and attempt to provide positive guidance to the federal and state courts alike" (*Miller*, Slip Opinion, 14), then should the Court not feel constrained to carefully delineate the process of reasoning leading to a conclusion that a book is unprotected by the First Amendment? Because the Court has failed to do so in this case, Petitioner respectfully urges the Court to grant a rehearing.

Conclusion.

For all the foregoing reasons, the Petition for Rehearing should be granted and the judgment herein should be reversed.

Respectfully submitted,

STANLEY FLEISHMAN,

DAVID M. BROWN,

Counsel for Petitioner.

SAM ROSENWEIN,

Of Counsel.

Attorneys' Certificate of Good Faith.

The undersigned, STANLEY FLEISHMAN and DAVID M. BROWN, attorneys for Petitioner, hereby certify that the Petition for Rehearing filed in this cause is presented in good faith, that in their judgment the grounds of said Petition are well taken and in conformance with the Court's rules and that said Petition for Rehearing is not interposed for delay.

STANLEY FLEISHMAN

DAVID M. BROWN

Counsel for Petitioner.

SUBJECT INDEX

	Page
Motion of the American Library Association to File an Amicus Curiae Brief in Support of Petition for Rehearing	1
Brief Amicus Curiae for American Library Association	9
Interest of the Amicus	9
Argument	9

I.

The First Amendment Is Not Limited to Protect- ing Works Which, "Taken as a Whole, Have Serious Literary, Artistic, Political or Scientific Value". To So Limit the Reach of the First Amendment Would Work a Drastic Undermin- ing of Free Speech	9
---	---

II.

The Right to Read Is a Fundamental Personal Right Implicit in the Concept of Ordered Lib- erty. This Right May Be Exercised in Li- braries, as Well as in the Home	15
---	----

III.

To Subject a Distributor of Books or Other Media of Expression to Criminal Prosecution for Distributing an "Obscene" Work Prior to the Time That There Has Been a Judicial De- termination of Its Obscenity Is a Denial of Due Process of Law and Constitutes Cruel and Unusual Punishment in Violation of the Eighth and Fourteenth Amendments to the United States Constitution	27
---	----

	Page
A. The "New" Standards Proscribing Obscenity, Like the "Old" Standards, Are Hopelessly Vague and "Unworkable" ..	29
B. Subjecting a Distributor of Books or Other Media of Expression to Criminal Prosecution for Distributing an "Obscene" Work Prior to the Time That There Has Been a Judicial Determination of Its "Obscenity" Is Cruel and Unusual Punishment	37

Conclusion	40
------------------	----

TABLE OF AUTHORITIES CITED

Cases	Page
Aday v. United States, 388 U.S.447	39
Apodaca v. Oregon, 406 U.S.404	35
Burstyn v. Wilson, 343 U.S.495	11
Butler v. Michigan, 352 U.S.380	21
Cohen v. California, 403 U.S.15	9, 11
Doubleday & Co., Inc. v. New York, 335 U.S.848	15
Dyson v. Stein, 401 U.S.200	14
Furman v. Georgia, 408 U.S.238	37, 38, 39
Ginzburg v. United States, 383 U.S.463	30, 31, 32, 33
Gooding v. Wilson, 405 U.S.518	9
Griswold v. Connecticut, 381 U.S.479	17
Marcus v. Search Warrants of Property, 367 U.S. 717	18
McCrary v. Oklahoma, No. 72-1648 (41 L.W. 3658)	39
Palko v. Connecticut, 302 U.S.319	15
Police Dept. of City of Chicago v. Mosley, 408 U.S. 92	10
Quantity of Copies of Books v. Kansas, 378 U.S. 205	18, 19
Roe v. Wade, 410 U.S.113	15
Silverthorne v. United States, 400 F.2d 625 (9 Cir. 1968), cert. den. 400 U.S.1022	36
Smith v. California, 361 U.S.147	17, 18
Stanley v. Georgia, 394 U.S.557	10, 22
Terminiello v. City of Chicago, 337 U.S.1	9

iv.

	Page
Thomas v. Collins, 323 U.S.516	17
United States v. Addonizio, 451 F.2d 41 (3 Cir. 1972), cert. den. 405 U.S.935	35, 36
United States v. Hamling, et al., 9th Cir. No. 72-1892, et seq., F.2d (June 7, 1973)	36
United States v. Klaw, 350 F.2d 155 (2 Cir. 1955)	36, 37
United States v. Levine, 83 F.2d 156 (2 Cir. 1936)	32
United States v. Reidel, 402 U.S.351	17
United States v. Roth, 237 F.2d 796 (2d Cir. 1956)	13, 22, 34
United States v. Vuitch, 402 U.S.62	33
Williams v. Florida, 399 U.S.78	35
Winters v. New York, 333 U.S.507	10, 11

Miscellaneous

Commission Report, p. 52	22
Commission Report, p. 139	22
Commission Report, pp. 374-375	24
Commission Report, p. 380	23
Commission Report, p. 385	24
Commission Report, pp. 634, 638	23
Commission Report, pp. 634-639	23

Rules

Federal Rules of Criminal Procedure, Rule 24(a) ..	35
--	----

Statutes	Page
California Education Code, Sec. 27000	26
California Penal Code, Sec. 311.2	20
United States Constitution, First Amendment	
.....7, 12, 13, 14, 15, 25, 29, 40	
United States Constitution, Eighth Amendment	
.....27, 28, 38	
United States Constitution, Fourteenth Amendment	
.....27, 28, 35, 38	

Publications

34 A.L.I. Proceedings (1957), pp. 191, 192	33
Black Beauty	27
Los Angeles Times, July 8, 1973, Part VII, 5	27
Once Is Not Enough by Jacqueline Susann	27
Portnoy's Complaint by Philip Roth	27
Rebecca of Sunnybrook Farm	27
The Joy of Sex by Alex Comfort	27

IN THE
Supreme Court of the United States

October Term, 1971

No. 71-1422

MURRAY KAPLAN,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

**Motion of the American Library Association to File
an Amicus Curiae Brief in Support of Petition for
Rehearing.**

The American Library Association, founded in 1876, is a nonprofit, educational organization, with its principal place of business located in Chicago, Illinois. Its membership includes more than 30,000 librarians, libraries and members of the general public who are devoted to the development of library services in the United States.

The Association is the chief spokesman for the modern library movement in North America and, to a considerable extent, throughout the world. Through its membership and its affiliation with its constituent state library associations, the American Library Association represents over 29,000 public university and special libraries, over 90,000 elementary and secondary school libraries and media centers and over 120,000 librarians.

The American library is an institution unique to American culture and tradition. Through it, citizens are provided essentially free access to books, periodicals, magazines, records, microfilms, pamphlets, films and other materials which they desire or require to satisfy their intellectual, emotional, recreational or professional interests.

Libraries and librarians have historically resisted efforts to limit their collections to those materials reflecting attitudes, ideas and literary styles bearing the imprimatur of governmental authority. American librarians, in contrast to librarians in totalitarian states, have not developed their collections with a view to protecting or reenforcing a particular set of contemporary community ideologies, attitudes or standards. Rather, they have sought to include in their collections books and other materials presenting all points of view concerning the problems, issues and attitudes of our times.

Nor have libraries and librarians sought to inquire into the uses made of their collections by their patrons. On the contrary, libraries have sought to encourage the widest possible dissemination and utilization of library resources by all citizens, regardless of their race, creed, color, national origin, sex, age or educational background.

In sum, American libraries and librarians have never functioned as agencies for the dissemination of propaganda or as censors of public morality. They have supported the public's freedom to read as an essential element of the intellectual freedom required by free men to remain free. They are committed to the principle that free communication is essential to the preservation of a free society and a creative culture.

This is not to say that libraries have not been subjected to heavy and continuing pressures from those elements which recognize the potential power of the library as a censorship tool. Yet, despite such pressures libraries have successfully resisted the assumption of censorship functions relying on this Court for ultimate vindication.

The decisions of the Supreme Court rendered on June 21st of this year suggest that such reliance was misplaced. Those decisions, including the one to which this Motion is addressed, in the opinion of the Association, permit the imposition of censorship functions on libraries and librarians which would fundamentally change their traditional role in support of intellectual freedom and would fundamentally alter the nature and content of their collections and the dissemination of such collections to the people.

Among the specific problems created by the June 21st decisions, but left unresolved by the Court, are the following:

1. How does a librarian determine whether or not a work in its collection, having sexual content, is to be used by a patron for permissible scientific purposes as opposed to impermissible recreational purposes? As presently organized, libraries have no capacity for the interrogation of their patrons as to their uses of library resources. This fact poses the further question of whether materials having sexual content must be separately identified, catalogued and segregated from the main collection in order to prevent their use for recreational purposes.

2. Must every work having sexual content acquired by a library be reviewed to determine

whether, taken as a whole, it has serious literary, artistic, political or scientific value? If this is required, may the librarian reviewing the book be liable to criminal prosecution as well as fine or imprisonment if a jury ultimately determines that the work is obscene under contemporary community standards? Librarians do not, in most cases, review their acquisitions prior to purchase. Rather, they purchase on the basis of published reviews, of requests from patrons, and on a blanket order basis from publishers and booksellers. A requirement that all works be reviewed for obscene content would have a significant impact on library operations and cost, because the presence of obscene content could not be determined without a review of the entirety of all works.

3. Where a library, for example, a state or regional library, serves more than one community having varying laws governing obscenity, what contemporary community standard is to be applied? The answer to this question directly affects the stocking and operations of intercommunity bookmobile programs, interlibrary loan policies and policies governing the issuance of library cards to nonresidents. These programs, long supported by educators and encouraged by state, local and federal government, are all designed to maximize library resources and reduce taxpayer costs.

4. May the unilateral decision of a librarian *not* to acquire a work on the ground that it is obscene be challenged by an author or publisher on the ground that such determination, at least to

the extent made by a public library, constitutes state action in violation of their First Amendment rights? Moreover, would not such decision subject the library or librarian to a trade libel action?

The view of the impact on the libraries expressed by Mr. Justice Douglas in his dissenting opinion in *Paris Adult Theatre v. Slaton* (Slip Opinion, 3) coincides with the view of libraries and librarians. If the decisions of the Court are to be taken literally, the American library system as we now know it will be destroyed. Beyond question, confronted with the prospect of reviewing all works they seek to acquire, libraries will acquire only those which enjoy the imprimatur of governmental authority; confronted with the prospect of criminal prosecution, librarians will omit from their collections any work which might be actionable; confronted with the prospect of meeting different and potentially conflicting "contemporary community standards", librarians will restrict their collections and services to a single community.

It is simply beyond the training or capacity of librarians or library trustees to determine, at their peril, whether a work is "serious", whether it is "patently offensive", or whether it "appeals to the prurient interest" of the "average person". As a practical matter, many works in a library collection are not "serious", for a library satisfies the people's need for entertainment and recreation as well as edification. Moreover, the seriousness of literature is frequently a matter of perspective. Thus, the Mother Goose Tales, which have entertained so many children for so many years, were viewed as very "serious" and scurrilous attacks by the censors who once banned them.

The responses of libraries and librarians described are not speculative. Based on extensive discussions with librarians throughout the Nation, they are certainties. The librarian has no economic interest in a book to justify his defense of it or its inclusion in his collection at the risk of his personal freedom. The sole justification of a librarian in the defense of any work is his philosophical conviction that the freedom to read is the essence of intellectual freedom and intellectual freedom is the price of liberty. In the face of the Court's June 21st decisions, the librarian may rightly conclude that the Court has priced intellectual freedom out of the marketplace of ideas.

If, on the other hand, Mr. Justice Douglas is wrong and the "net now designed by the Court" as it affects librarians cannot be taken "literally", it would appear appropriate for the Court to make that fact known, so that the communities now devising obscenity legislation may be instructed.

It takes but a short while to purge a library collection. Hitler accomplished it in one night. On the other hand, it takes centuries to create a collection, and it takes the continuing dedication of thousands of librarians to preserve that collection. Libraries have known "dark ages" before when collections have been destroyed and disbursed, literary works suppressed, access to unpopular information foreclosed, and ideological conformity substituted for intellectual freedom.

Librarians ask leave to submit this Brief in support of petitioner's Petition for Rehearing in the hope that

America's Dark Age will not date from June 21, 1973. In so doing, *amicus* respectfully requests the Court:

1. To reconsider and reject its statement that the First Amendment is limited to protecting works which, taken as a whole, have *serious* literary, artistic, political or scientific value; and
2. To reconsider and reject its holding that the right to read is not fundamental and implicit in the concept of ordered liberty, except in one's home; and
3. To reconsider and reject the view that distributors of books and other media of expression may be held criminally liable for distributing an "obscene" work before there has been a judicial determination, in a civil proceeding, establishing that the work is obscene.

Amicus asks leave to file the annexed Brief in this case. Petitioner has consented to the filing of this *amicus curiae* Brief, and respondent has not yet replied to *amicus*' request for consent.

WILLIAM D. NORTH,
E. HOUSTON HARSHA,

By E. HOUSTON HARSHA,

Attorneys for Amicus Curiae.

KIRKLAND & ELLIS,
Of Counsel.

BRIEF AMICUS CURIAE FOR AMERICAN LIBRARY ASSOCIATION.

Interest of the Amicus.

The interest of *amicus* is set forth in the Motion for Leave to File this Brief.

ARGUMENT.

I.

The First Amendment Is Not Limited to Protecting Works Which, "Taken as a Whole, Have Serious Literary, Artistic, Political or Scientific Value". To So Limit the Reach of the First Amendment Would Work a Drastic Undermining of Free Speech.

In *Miller v. California*, the Court said: "The First Amendment protects works which, taken as a whole, have serious literary, artistic, political or scientific value, regardless of whether the Government or a majority of the people approve of the ideas these works represent." (Slip Opinion, 20). Never before has the First Amendment been thought limited to expressions of *serious* literature or political value. *Paris Adult Theatre v. Slaton* (Brennan, dissenting, Slip Opinion, 25). See, *Gooding v. Wilson*, 405 U.S.518; *Cohen v. California*, 403 U.S.15, 25-26; *Terminiello v. City of Chicago*, 337 U.S.1, 4-5. Giving protection only to "serious" works will likely have the effect, as Justice Brennan observed, "of permitting a far more sweeping suppression of sexually oriented expression, including expression that would almost surely be held protected under our current formulation" (*Id.*, 24). Under the "new" rule, all a prosecutor need do

is satisfy a jury that the value of the work, measured by some unspecified standard, is not sufficiently "serious" to warrant constitutional protection. "That result is not merely inconsistent with . . . *Roth*, it is nothing less than a rejection of the fundamental First Amendment premise and rationale of the *Roth* opinion and an invitation to widespread suppression of sexually oriented speech." (*Id.*, 25).

Only a year ago, this Court said that above all else:

"... [T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. . . . To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.' *New York Times Co. v. Sullivan*. . . ." (*Police Dept. of City of Chicago v. Mosley*, 408 U.S.92, 95-96).

In *Stanley v. Georgia*, 394 U.S.557, the Court, citing *Winters v. New York*, 333 U.S.507, stated that it is irrelevant "that obscene materials in general, or the particular films before the Court, are arguably devoid of any ideological content. The line between the transmission of ideas and mere entertainment is much too illusive for this Court to draw, if indeed such a line can be drawn at all." (394 U.S. at 566). In *Winters*

v. *New York*, 333 U.S. at 510, the Court rejected the suggestion that the constitutional protection for a free press applies only to the exposition of ideas. "Everyone is familiar with instances of propaganda through fiction. What is one man's amusement teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature."

In *Burstyn v. Wilson*, 343 U.S. 495, 501, Justice Clark observed that motion pictures although designed to entertain and to make money are nevertheless "a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform. . . ."

Mr. Justice Harlan, in *Cohen v. California*, 403 U.S. 15, 24, his last major opinion dealing with the First Amendment, emphasized that the constitutional right of free expression "is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premises of individual dignity and choice upon which our political system rests." Justice Harlan rejected the notion that it is pos-

sible to suppress a "trifling" expression without adversely affecting fundamental First Amendment rights. "That is why '[w]holly neutral futilities * * * come under the protection of free speech as fully as do Keats' poems or Donne's sermons' . . . and why 'so long as the means are peaceful, the communication need not meet standards of acceptability.' . . ."

Expression, Justice Harlan said, serves a dual communicative function: "It conveys not only ideas capable of relatively precise detached explication, but otherwise inexpressible emotions as well." Words, he observed, "are often chosen as much for their emotive force as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech has little or no regard for that emotive function which practically speaking, may often be the more important element of the overall message sought to be communicated. . . ." (403 U.S. at 26).

Justice Harlan, citing Justice Frankfurter, observed that one of the prerogatives of American citizenry is the right to speak "foolishly" and without moderation. In conclusion, Justice Harlan stated:

"Finally, and in the same vein, we cannot indulge the facile assumption that one can forbid particular words without also running substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views. We have been able, as noted above, to discern little social benefit that might result from running the risk of opening the door to such grave results." (403 U.S. at 26).

If, as the Court suggests, the First Amendment only protects works with serious literary, artistic, political or scientific value, it would appear to follow that works deemed "political trifles" are not constitutionally protected. It cannot be repeated too often that governmental efforts at thought control can rarely be confined to questions of manners and taste. The yearning to use governmental censorship of any kind is infectious. It tends to spread insidiously. The heady power that comes with the suppression of "sexy" books deemed not "serious" will inevitably spill over into the areas of religion, politics and elsewhere.

"Plato, who detested democracy, proposed to banish all poets; and his rulers were to serve as 'guardians' of the people telling lies for the people's good, vigorously suppressing writings these guardians thought dangerous. Governmental guardianship is repugnant to the basic tenet of our democracy: According to our ideals, our adult citizens are self-guardians, to act as their own fathers, and thus become self-dependent. When our government officials act toward our citizens on the thesis that 'Papa knows best what's good for you,' they enervate the spirit of the citizens: To treat grown men like infants is to make them infantile, dependent, immature." (Judge Frank, concurring in *United States v. Roth*, 237 F.2d at 823).

Amicus recognizes the force of the statement in *Paris Adult Theatre v. Slaton* (Slip Opinion, 13-14), that if "good" books, plays and art lift the spirit, improve the mind, enrich the human personality and develop character, then "bad" works may have a

contrary effect. But "under the Constitution as written there are no standards of 'good' or 'bad' for the press". *Dyson v. Stein*, 401 U.S.200, 212 (Justice Douglas, dissenting).

As librarians and as persons interested in libraries, we stake out a lofty claim for the value of books. We do so because we believe that they are good, possessed of enormous variety and usefulness, worthy of cherishing and keeping free. We realize that the application of these propositions may mean the dissemination of ideas and manners of expression that are repugnant to many persons. We do not state these propositions in the comfortable belief that what people read is unimportant. We believe rather that what people read is deeply important; that ideas can be dangerous; that they can be "clinically explicit and offensive to the point of being nauseous"; but that the suppression of the freedom to read is fatal to a democratic society. Freedom itself is a dangerous way of life, but the First Amendment has committed us to that way.

In light of the above, *amicus* respectfully urges the Court to grant the Petition for Rehearing and reaffirm that the First Amendment protects not only the serious works of today but the "neutral futilities", "mere entertainments" and political "trifles" which may be the shards from which the future may know us. These "neutral futilities" played a useful part in striking layers of prudery from a subject long irrationally kept from needed ventilation". (*Miller v. California*, Slip Opinion, 22).

II.

The Right to Read Is a Fundamental Personal Right Implicit in the Concept of Ordered Liberty. This Right May Be Exercised in Libraries, as Well as in the Home.

In the case at bar, the Court, for the first time, addressed itself to the issue of whether an unillustrated book can be legally "obscene" in the sense of being unprotected by the First Amendment.¹ Recognizing that a book "seems to have a preferred place in our hierarchy of values, and so it should", the Court nevertheless held that the book *Suite 69* was outside the protection of the First Amendment.

The Court also held that while a constitutional right of privacy existed for a person reading or viewing an "obscene" work at his home, no similar right existed outside the home. The Court said:

"Our prior decisions recognizing a right to privacy guaranteed by the Fourteenth Amendment included 'only those personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S.319, 325.' *Roe v. Wade*, 410 U.S.113, 152 (1973)." (*Paris Adult Theatre v. Slaton*, Slip Opinion, 16).

The suggestion that *Palko v. Connecticut*, *supra*, supports the proposition that the right to read is not a fundamental right is erroneous. Quite to the contrary,

¹In the quarter of a century since this Court affirmed, by an equally divided court, a conviction for the sale of the "obscene" book *Hecate County*, by Edmund Wilson, one of America's foremost men of letters, *Doubleday & Co., Inc. v. New York*, 335 U.S.848 (1948), no other unillustrated book has been found obscene by this Court.

Justice Cardozo made it crystal clear that the right to read is fundamental and central to "every other form of freedom". Speaking for the Court, Justice Cardozo said:

"Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom. With rare aberrations a pervasive recognition of that truth can be traced in our history, political and legal. So it has come about that the domain of liberty, withdrawn by the Fourteenth Amendment from encroachment by the states, has been enlarged by latter-day judgments to include liberty of the mind as well as liberty of action. The extension became, indeed, a logical imperative when once it was recognized, as long ago it was, that liberty is something more than exemption from physical restraint. . . ." (302 U.S. at 327).

It is also hard to understand how *Roe v. Wade*, *supra*, supports the Court on this issue. In that case, the Court held that a woman has a constitutional right to have an abortion. It is difficult for *amicus* to comprehend how that right can be deemed more fundamental to the concept of ordered liberty than the right to read.

Roth itself recognized the fundamental nature of the right to read about all matters of public concern.

"... The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply the public need for information and education with respect to the significant issues of the times. Freedom of discussion, if it would fulfill its historic function

in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." (Emphasis added.) *Roth*, 354 U.S. at 487-488. See also, *Thomas v. Collins*, 323 U.S. 516, 531 (1945) ("the rights of free speech and a free press are not confined to any field of human interest").

Even *United States v. Reidel*, 402 U.S. 351, 355-356, recognized that *Stanley* held that the right to read was a personal fundamental right protected by the Constitution, at least in one's home. *Griswold v. Connecticut*, 381 U.S. 479, 482, specifically stated that "the right of freedom of speech and press includes the . . . right to read".

There is nothing in any of the Court's prior decisions which so much as suggests that this fundamental right to read is not broad enough to include reading a book of one's choice in a library, or taking a book from a library to read at home.

To equate the reading of books with the disposal of garbage and sewage (*Paris Adult Theatre v. Slaton*, Slip Opinion, 15), is to demean the great meaning of the First Amendment. A long and undeviating line of cases establishes that allegedly obscene books cannot be treated like gambling paraphernalia or narcotics, nor, it is respectfully submitted, may they be equated with garbage or sewage. In *Smith v. California*, 361 U.S. 147, the Court drew a constitutional distinction between the kind of guilty knowledge required on the part of a person charged with violating the food or drug laws and a person charged with violating the obscenity laws. After observing that the usual

rationale for such statutes is that the public interest in the purity of its food is so great as to warrant the imposition of the highest standard of care on distributors, the Court said:

"There is no specific constitutional inhibition against making the distributors of foods the strictest censors of their merchandise, but the constitutional guarantees of the freedom of speech and of the press stand in the way of imposing a similar requirement on the bookseller." (361 U.S. at 152-153).

Mr. Justice Frankfurter, concurring, observed that:

"... [T]here is an important difference in the scope of the power of a State to regulate what feeds the belly and what feeds the brain. . . . The balance that is struck between [the general principle that awareness of what one is doing is a prerequisite for the infliction of punishment] and the overriding public menace inherent in the trafficking in noxious food and drugs cannot be carried over in balancing the vital role of free speech as against society's interest in dealing with pornography." (361 U.S. at 162).

In *Marcus v. Search Warrants of Property*, 367 U.S. 717, the Court held that the State's power to suppress obscenity is limited by the constitutional protections for free expression. The Court held that the State of Missouri could not treat "obscenity" in the same way that it could treat gambling paraphernalia or other contraband. In *Quantity of Copies of Books v. Kansas*, 378 U.S. 205, the Court asserted the same proposition, saying:

"It is no answer to say that obscene books are contraband, and that consequently the standards

governing the searches and seizures of allegedly obscene books should not differ from those applied with respect to narcotics, gambling paraphernalia and other contraband." (378 U.S. at 211-212).

Quoting from *Marcus*, the Court stated:

"The authority to the police officers under the warrants issued . . . poses problems not raised by the warrants to seize "gambling implements" and "all intoxicating liquors" involved in the cases cited by the Missouri Supreme Court. . . . For the use of these warrants implicates questions whether the procedures leading to their issuance and surrounding their execution were adequate to avoid suppression of constitutionally protected publications. ". . . [T]he line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn. . . . The separation of legitimate from illegitimate speech calls for . . . sensitive tools. . . ." It follows that, under the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity as here involved without regard to the possible consequences for constitutionally protected speech.' " (378 U.S. at 212).

In *Roaden v. Kentucky* and *Heller v. New York*, the Court again recognized that law enforcement officials cannot treat allegedly obscene books the way they can treat gambling paraphernalia or narcotics.

The issue is not, it is submitted, whether the right to read is fundamental and implicit in the concept of ordered liberty. Our whole constitutional heritage, and

virtually every prior case decided by this Court, attest to the fact that the right exists. The critical issues are whether the State has a compelling interest in prohibiting consenting adults from exercising their right to read; whether California Penal Code Section 311.2 is necessary to the accomplishment of a permissible state policy; and whether California Penal Code Section 311.2 is sufficiently narrowly drawn as not to impinge on constitutionally protected rights.

There is no compelling state interest in preventing persons, who have a constitutional right to read an "obscene" book at home, from reading such a book in a library, or from taking such a book from a library to their homes.

In the case at bar, the Court gave the following justification for interfering with an adult's right to read a book of his choice:

"For good or ill, a book has a continuing life. It is passed hand to hand, and we can take note of the tendency of widely circulated books of this category to reach the impressionable young and have a continuing impact. A State could reasonably regard the 'hard core' conduct described by *Suite 69* as capable of encouraging or causing antisocial behavior, especially in its impact on young people. States need not wait until behavioral experts or educators can provide empirical data before enacting controls of commerce in obscene materials unprotected by the First Amendment or by a constitutional right to privacy. We have noted the power of a legislative body to enact such regulatory laws on the basis of unprovable assumptions." (*Kaplan v. California*, Slip Opinion, 5).

Initially it should be observed that measuring the impact of a book, under a general obscenity statute, by its impact on youth is a flat repudiation of the rule unanimously laid down by the Court in *Butler v. Michigan*, 352 U.S.380. In *Butler*, Justice Frankfurter, speaking for the Court, held unconstitutional a Michigan obscenity law that made it an offense for a bookseller "to make available for the general reading public . . . a book . . . found to have a potentially deleterious influence upon youth" (352 U.S. at 382-383). In *Butler*, as in the case at bar, the book was in fact sold to a police officer. Michigan argued that it was "reasonable" to quarantine "the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence. . . ." (352 U.S. at 383).

In striking down the Michigan statute, Mr. Justice Frankfurter stated:

"We have before us legislation not reasonably restricted to the evil with which it is said to deal. The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children. It thereby arbitrarily curtails one of those liberties of the individual, now enshrined in the Due Process Clause of the Fourteenth Amendment, that history has attested as the indispensable conditions for the maintenance and progress of a free society. . . ." (352 U.S. at 383-384).

In *Roth*, the Court incorporated the *Butler* decision, holding that under a general obscenity law, the challenged work must be measured solely by its impact on the average adult.

The Court's statement herein that the book in question was "capable of encouraging or causing antisocial behavior, especially in its impact on young people" is the purest speculation and without any empirical support. In *United States v. Roth*, 237 F.2d 796 (2d Cir. 1956), Judge Frank, after examining the literature as of that date, concluded that there is no basis for believing that "obscenity" induces antisocial behavior. (237 F. 2d at 812-817). The same conclusion was reached, with even more emphasis, in *Stanley v. Georgia*, 394 U.S.557, 566.

The *Report of the Commission on Obscenity and Pornography* reached the same result after two years of study and after engaging in approximately sixty independent scientific research projects to determine what effect "obscene" material had on people. The Commission concluded that:

"If a case is to be made against 'pornography' in 1970, it will have to be made on grounds other than demonstrated effects of a damaging personal or social nature. Empirical research designed to clarify the question has found no reliable evidence to date that exposure to explicit sexual materials plays a significant role in the causation of delinquent or criminal sexual behavior among youth or adults." (*Commission Report*, 139).

This empirical investigation "supports the opinion of a substantial majority of persons professionally engaged in the treatment of deviancy, delinquency and antisocial behavior, that exposure to sexually explicit materials has no harmful causal role" in the areas of crime, delinquency or sexual deviancy. (*Commission Report*, 52).

Two of the Commissioners who endorsed the majority conclusion were Dr. Morris A. Lipton and Dr. Edward D. Greenwood.² They filed a separate statement in which they stated:

"We would have welcomed evidence relating exposure to erotica to delinquency, crime and antisocial behavior, for if such evidence existed we might have a simple solution to some of our most urgent problems. However, the work of the Commission has failed to uncover such evidence. Although the many and varied studies contracted for by the Commission may have flaws, they are remarkably uniform in the direction to which they point. This direction fails to establish a meaningful causal relationship or even significant correlation between exposure to erotica and immediate or delayed antisocial behavior among adults. To assert the contrary from the available evidence is not only to deny the facts, but also to delude the public by offering a spurious and simplistic answer to highly complex problems." (*Commission Report*, 380).

Dr. G. William Jones, an ordained Methodist clergyman, as well as an educator, stated:

"As a clergyman, and as one who follows a Leader who said, 'I am . . . the Truth,' and 'They shall know the Truth and the Truth shall set them free,' I believe that the search for truth is a liberating, and thus a holy, quest and that science has often proven itself to be God's handmaiden in

²Their credentials are set forth in the *Commission Report*, 634, 638. The qualifications of all of the Commissioners are found in the *Report*, 634-639.

this quest. Although many religious persons may be distressed by the findings of our research, they must certainly rejoice that misconceptions and prejudices are being replaced by knowledge, and that our concern and efforts may now be re-directed toward what appears to be the surer roots of the sexual maladies of our people.

"I have long been concerned that the burden of blame and the therapy of re-education be focused on the true sources of the sexual crimes and maladjustments which plague our country and its citizens. If certain kinds of books or films had been proven the cause, then I was quite willing to join in the crusade against them. However, it has been very adequately shown through our research that the roots of such behavior lie in the home and in the early years of family and sibling relationships. It is good, I believe, to stop chasing what may have been our unconscious scapegoats in the media and to concentrate these energies instead upon the kind of re-education of the family which will make for health and sanity." (*Commission Report*, 374-375).

Even the dissenters—Father Hill and Reverend Link—failed to base their case in support of government control of obscenity on the proposition that "obscenity" incites antisocial conduct. They said:

"The government interest in regulating pornography has always related primarily to the prevention of moral corruption and *not* to prevention of overt criminal acts and conduct, or the protection of persons from being shocked and/or offended." (*Commission Report*, 385) (emphasis in original).

It thus appears that in the case at bar there is no sufficiently compelling reason to justify the interference with the right of free persons to read what they choose.

In *Paris Adult Theatre v. Slaton* (Slip Opinion, 11), the Court said:

"Although there is no conclusive proof of a connection between antisocial behavior and obscene material, the legislature of Georgia could quite reasonably determine that such a connection does or might exist."

With all deference, we suggest, that on the available evidence Georgia could not reasonably determine that there is a causal connection between antisocial behavior and obscene material. As Drs. Lipton and Greenwood stated:

"To assert [that there is such a relationship] is not only to deny the facts, but also to delude the public by offering a spurious and simplistic answer to highly complex problems."

Freedom of speech and press cannot be limited on such a slender showing. The State has not only failed to make a compelling showing to justify the deep intrusions of First Amendment rights, but has failed to justify the intrusion even "rationally".

In *Paris Adult Theatre v. Slaton* (Slip Opinion, 15), the Court recognized the standing of a theatre operator to assert the right of his customers to view films of their choice. Librarians have even greater standing to assert their patrons' right to read. In California, for

example, the Legislature has recognized the importance of public libraries, saying:

"The legislature hereby declares it is in the interest of the people of the State that there be a general diffusion of knowledge and intelligence through the establishment and operation of public libraries. Such diffusion is a matter of general concern inasmuch as it is the duty of the State to provide encouragement to the voluntary lifelong learning of the people of the State.

"The legislature further declares that the public library is a supplement to the formal system of free public education, and a source of information and inspiration to persons of all ages, and a resource for continuing education beyond the years of formal education, and as such deserves adequate financial support from government of all levels." (California Education Code §27000).

It follows, *amicus* suggests, that a patron of a library has a right to read in the library any book of his choice, and similarly has a right to take home from his library any book that is of interest to him, without regard to the content of the book. That right, we submit, is fundamental and is implicit in the concept of ordered liberty.

III.

To Subject a Distributor of Books or Other Media of Expression to Criminal Prosecution for Distributing an "Obscene" Work Prior to the Time That There Has Been a Judicial Determination of Its Obscenity Is a Denial of Due Process of Law and Constitutes Cruel and Unusual Punishment in Violation of the Eighth and Fourteenth Amendments to the United States Constitution.

In the nature of things, librarians are particularly vulnerable to the threat of prosecution under state obscenity laws. It is the duty of librarians to collect and disseminate works of the widest possible interest and diversity. Some of these works may be thought obscene by local law enforcement officials emboldened by the Court's opinion herein, and the related cases.²

²In Oklahoma City, for example, the District Attorney stated that under this Court's decision the only books that were safe were *Rebecca of Sunnybrook Farm* and *Black Beauty*. (Okla. Journal, June 22, 1973). At the present time, the bestselling work of fiction is *Once Is Not Enough* by Jacqueline Susann, and the bestselling work of nonfiction is *The Joy of Sex* by Alex Comfort. *The Joy of Sex* is replete with pictures of the ultimate sex act and *Once Is Not Enough* is replete with descriptions thereof. Both books can be found in most major libraries. Whether a jury will find they are "serious" works is of course a matter of the purest conjecture. Relying on this Court's decision of June 21st, the Georgia Supreme Court has just condemned as obscene the film "CARNAL KNOWLEDGE", directed by the award-winning Mike Nichols. Following this Court's decision, Salt Lake City, Utah, law enforcement officials vowed that they would seize "LAST TANGO IN PARIS" if it came to town. Jason Epstein of Random House, who edited the book *Portnoy's Complaint* by Philip Roth, said, "There is nothing that protects 'Portnoy' or anything now." In Kansas City, Mo., a county circuit judge ordered the destruction of 127 different magazines and books seized in police raids. In Cleveland, a major bookseller removed the magazine "Playgirl", featuring a nude of George Maharis in the centerfold. In Boise, Idaho, "Playboy" was removed from the racks. (Los Angeles Times, July 8, 1973, Part VII, 5).

Because the crime of "obscenity" is so vague and arbitrarily enforced, a judicial determination prior to the initiation of a criminal prosecution is required by the Due Process Clause of the Fourteenth Amendment and by the Cruel and Unusual Punishment Clause of the Eighth Amendment as the same is incorporated into the Fourteenth Amendment.

In *Paris Adult Theatre v. Slaton*, the Court stated that a procedure pursuant to which a challenged work's obscenity is judicially determined in a civil proceeding provides a distributor "the best possible notice, prior to any criminal prosecution, as to whether the materials are unprotected by the First Amendment and subject to state regulation." (Slip Opinion, 5).

Justice Douglas, dissenting in *Miller v. California* (Slip Opinion, 4-5), expressed the view that such a prior determination was constitutionally required to satisfy the "fair notice" requirement of the Due Process Clause. After commenting on the difficulty the Court has had trying, unsuccessfully, to define obscenity, he argued that obscenity could not be defined because it deals with subjective matters of taste. "What shocks me may be sustenance for my neighbor. What causes one person to boil in rage over one pamphlet or movie may reflect only his neurosis, not shared by others. . . . Obscenity cases usually generate tremendous emotional outbursts. They have no business being in the courts. . . . Under the present regime—whether the old standards or the new ones are used—the criminal law becomes a trap." Justice Douglas argued that "until a civil proceeding has placed a tract beyond the pale, no criminal prosecution should be sustained. . . . In any case—certainly when constitutional rights are involved—we should not

allow men to go to prison or be fined when they had no 'fair warning' that what they did was criminal conduct". (*Id.*, 4-6).

If a specific book has been condemned as obscene in a civil proceeding, and thereafter a person distributes that particular work, then, Justice Douglas stated, "a vague law has been made specific". A criminal prosecution brought at that juncture "would not violate the time-honored void-for-vagueness test. . . . Obscenity—which even we cannot define with precision—is a hodge-podge. To send men to jail for violating standards they cannot understand, construe and apply is a monstrous thing to do in a Nation dedicated to fair trials and due process." (*Id.*, 6-7).

A. The "New" Standards Proscribing Obscenity, Like the "Old" Standards, Are Hopelessly Vague and "Unworkable".

1. There is unanimity of opinion in the June 21, 1973 decisions on only one point—that the *Roth* test has failed to give adequate guidance as to what material was criminal and what material was unconditionally protected by the free speech and press provisions of the First Amendment. In *Miller v. California*, the Court tracked the various obscenity decisions since *Roth* and concluded they were "unworkable." Justice Brennan, the author of *Roth*, stated that his experience had convinced him that "the approach initiated 15 years ago in *Roth* . . . and culminated in the Court's decision today, cannot bring stability to this area of the law without jeopardizing fundamental First Amendment values, and I have concluded that the time has come to make a significant departure from that approach." (Justice Brennan, dissenting in *Paris, Slip*

Opinion, 1). He went on to say that the Court's efforts to implement *Roth* "demonstrate that agreement on the existence of something called 'obscenity' is still a long and painful step from agreement on a workable definition of the term", and that he was reluctantly forced to the conclusion that "none of the available formulas, including the one announced today, can reduce the vagueness to a tolerable level while at the same time striking an acceptable balance between the protections of the First and Fourteenth Amendments, on the one hand, and on the other the asserted state interest in regulating the dissemination of certain sexually oriented materials". Thus, concluded Justice Brennan: "As a result of our failure to define standards with predictable application to any given piece of material, *there is no probability of regularity in obscenity decisions by state and lower federal courts.*" (Emphasis added).

2. From a vagueness point of view, it is certainly true that the differences between the "new" formulation and the "old" one, are, "for the most part, academic." (Justice Brennan, dissenting in *Paris*, Slip Opinion, 22). As Justice Brennan pointed out, the first element of the Court's "new" test is virtually identical to the *Memoirs* requirement that "the dominant theme of the material taken as a whole [must appeal to a prurient interest in sex]. (383 U.S. at 418). Under the "new" standard, the test is "whether the average person applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest."

Justice Black, dissenting in *Ginzburg v. United States*, 383 U.S. 463, 478-479, stated that "human beings, serving either as judges or jurors, could not be expected to give any sort of decision" concerning pru-

rient interest "which would even remotely promise any kind of uniformity in the enforcement of this law." He observed that the determination of whether material appeals to "prurient interest in sex" would depend on subjective reactions rather than on evidence such as can ordinarily be given in a criminal case. "In the final analysis, the submission of such an issue . . . to a judge or jury amounts to nothing more than a request for the judge or juror to assert his own personal beliefs about whether the matter should be allowed to be legally distributed. Upon this subjective determination the law becomes certain for the first and last time." The same observations are of course true with regard to whether material is "patently offensive" to community standards. Similarly, the test of "seriousness" is extraordinarily vague. What is serious to a truck driver with only an elementary education would, almost certainly, be found to be "frivolous" by a Ph.D. To paraphrase what Justice Black stated in *Ginzburg* concerning social value: "This element seems to me to be as uncertain . . . [as] the unknown substance of the Milky Way. If we are to have a free society as contemplated by the Bill of Rights, then I can find little defense for leaving the liberty of American individuals subject to the judgment of a judge or jury as to whether material that provokes thought or stimulates desire is [a work having serious literary, artistic, political or scientific value]. . . . Whether a particular treatment of a particular subject [is or is not 'serious'] in this evolving, dynamic society of ours is a question upon which no uniform agreement could possibly be reached among politicians, statesmen, professors, philosophers, scientists, religious groups or any other type of group. A case-by-case assessment of

['seriousness'] by individual judges and jurors is, I think, a dangerous technique for government to utilize in determining whether a man stays in or out of the penitentiary."

Justice Black's conclusion in *Ginzburg* is still true today: "My conclusion is that . . . no person, not even the most learned judge, much less a layman, is capable of knowing in advance of an ultimate decision in his particular case by this Court whether certain material comes within the area of 'obscenity' as that term is confused by the Court today." This is the identical conclusion reached by Justice Brennan, dissenting in *Paris Adult Theatre v. Slaton* (Slip Opinion, 20), where he said:

" . . . The problem is . . . that one cannot say with certainty that material is obscene until at least five members of this Court, applying inevitably obscure standards, have pronounced it so."

3. In the June 21 decisions, the Court recognized, as heretofore noted, that the *Roth* test was unworkable. The Court expressed the hope that its revised *Roth* test could be made "workable" by shifting the burden of identifying obscenity to the jury. This approach was tried in the past, and failed. In *United States v. Levine*, 83 F.2d 156, 157 (2 Cir. 1936), Judge Learned Hand stated that obscenity "is a function of many variables, and the verdict of the jury is not the conclusion of a syllogism of which they are to find only the minor premises, but really a small bit of legislation ad hoc. . . ." There can never be, he said, "constitutive principles for such judgments, or indeed more than cautions to avoid the personal aberrations of the jurors."

In 1957, Judge Hand returned to the same theme. Speaking at the proceedings of the American Law Institute during the deliberation of Model Penal Code Tentative Draft No. 6, dealing with obscenity, Judge Hand said obscenity "cannot be defined", and he therefore objected to "an attempt to define the indefinable" (34 A.L.I. Proceedings, 191 [1957]). Judge Hand concluded that "we must not try to be definite. We must leave it to the jury to say, is this obscene? Is it contrary to what you all think ought not to be? . . . The attempt to mix in with this an objective standard . . . seems to me to be absurd." (*Id.*, 192).

To entrust to a jury the responsibility of separating constitutionally protected speech from criminal speech is to abandon the rule of law to the "personal aberrations" of the jurors. Where the "crime" cannot be defined and where, as here, the issue generates "tremendous emotional outbursts" (Justice Douglas, dissenting in *Miller*, Slip Opinion, 4), this is particularly true.

Justice Douglas correctly stated in *United States v. Vuitch*, 402 U.S.62, 80, that the subject of obscenity is an inflammatory one. "People instantly take sides and the public, from whom juries are drawn, makes up its mind one way or the other before the case is even argued." Since the statutory guides are extremely broad and subjective, juries have a wide range to vote their prejudices, and those who circulate books have no reliable guidelines. Justice Black, dissenting in *Ginzburg v. United States*, 383 U.S.463, 480, expressed the same view, stating that the submission of an issue of the obscenity of material to a jury "amounts to practically nothing more than a request for the . . .

juror to assert his own personal beliefs about whether the matter should be legally distributed".

In *United States v. Roth*, 237 F.2d 796 (2 Cir. 1956), Judge Frank pointed to the danger of entrusting to a jury the protection of First Amendment rights in an obscenity prosecution. Initially, he observed that "no statistician would conceivably accept the view of a jury—twelve persons chosen at random—as a fair sample of community attitudes on such a subject as obscenity. A particular jury may voice the 'moral sentiments' of a generation ago, not of the present" (237 F.2d at 822). In an obscenity case, he said, each jury constitutes "a tiny autonomous legislature. Any one such legislature, as experience teaches, may well differ from any other in thus legislating as to obscenity. And, one may ask, was it the purpose of the First Amendment, to authorize hundreds of divers jury-legislators, with discrepant beliefs, to decide whether or not to enact hundreds of divers statutes interfering with freedom of expression?" (237 F.2d at 822-823). Judge Frank also commented upon the stultifying effect on literature of permitting juries to decide what literature should be preserved and what literature should be consigned to the bonfire. "To vest a few fallible men— . . . jurors—with vast powers of literary or artistic censorship, to convert them to what J. S. Mill called 'a moral police', is to make them despotic arbiters of literary products. . . . An author's imagination may be cramped if he must write with one eye on juries." (273 F.2d at 825).

It is to be remembered that no expert testimony or any other evidence need be submitted to the jury once the challenged work is placed in evidence. If no evidence is needed by jurors in obscenity cases (*Paris*

Adult Theatre v. Slaton, Slip Opinion, 7, n.6), then the "trial" becomes a mockery. Each juror is then free to vote his "personal opinion" rather than to find the facts. Too frequently that "personal opinion" will not be his own but the one he believes he is expected to hold.

The heavy reliance the Court has now placed upon the jury in obscenity cases should be viewed against the background of *Williams v. Florida*, 399 U.S.78, and *Apodaca v. Oregon*, 406 U.S.404. In *Williams*, the Court held that a State was not required to afford a defendant a jury of 12, and that a jury panel of six members did not violate the defendant's Sixth Amendment rights as applied through the Fourteenth Amendment. The Court said: ". . . [W]hile in theory the number of viewpoints represented on a randomly selected jury ought to increase as the size of the jury increases, in practice the difference between the 12-man and the six-man jury in terms of the cross-section of the community represented seems likely to be negligible. Even the 12-man jury cannot insure representation of every distinct voice in the community, particularly given the use of the peremptory challenge. . . ." (399 U.S. at 100-102).

In *Apodaca v. Oregon*, and the related cases, the Court held that the Sixth Amendment guarantee of a jury trial made applicable to the States by the Fourteenth Amendment does not require that the jury's vote be unanimous.

In criminal jury cases, the defendants are often stripped of their right to *voir dire* a jury. See, Rule 24(a) Federal Rules of Criminal Procedure, 18 U.S.C.A.; *United States v. Addonizio*, 451 F.2d 41,

65, 66 (3 Cir. 1972), cert. denied 405 U.S.935; *Silverthorne v. United States*, 400 F.2d 625, 638 (9 Cir. 1968), cert. denied 400 U.S.1022.

In a recent obscenity case, *United States v. Hamling, et al.*, 9th Cir. No. 72-1892, *et seq.*, F.2d (June 7, 1973), the Court held it was not error for the trial court to refuse "to ask prospective jurors questions on voir dire designed to expose their biases and prejudices concerning 'obscenity' and sex." In that case, the defendants were denied all opportunity to ask questions on such subjects as reading habits, film viewing, attendance at place of worship and the like. The Ninth Circuit said of the trial court rulings:

"The handling of those questions not asked was clearly within the range of the District Court's discretion in the matter and no clear abuse of the discretion nor prejudice to the appellants has been shown." (Slip Opinion, 10-11).

In *United States v. Klaw*, 350 F.2d 155 (2 Cir. 1955), the Court warned against the dangers in leaving jurors free to speculate as to the obscenity of questioned material.

"Even if the jury did not consist of twelve carefully selected Anthony Comstocks, it might well believe that the predominant appeal of certain acknowledged works of art, sculpture and literature found in all our well-known museums and libraries would be to the prurient interest of the average person, or perhaps someone else. But if that be so, can we allow the censor's stamp to be affixed on the basis of an uninformed jury's misconceptions?" (350 F.2d at 167).

Later, the court stated that unless the jury was tightly controlled and supervised, "a witch hunt might well come to pass which would make the Salem tragedy fade into obscurity." (350 F.2d at 170). Recognizing the dangers inherent in merely showing the challenged material to jurors and permitting them to decide whether it was "obscene", the Court said:

"... [I]t would be altogether too easy for any prosecutor to stand before a jury, display the exhibits involved, and merely ask in summation: 'Would you want your son or daughter to see or read this stuff?' A conviction in every instance would be virtually assured."

It is against this background that *amicus* insists that subjecting librarians to emotionally charged criminal obscenity trials under admittedly vague standards is a sheer denial of Due Process of Law. As bad as censorship is, if we are to embark upon such a course, let there at least be the fair warning of a prior judicial decree of what is to be censored. A librarian should not be forced to be both a censor and a defendant in a criminal case.

B. Subjecting a Distributor of Books or Other Media of Expression to Criminal Prosecution for Distributing an "Obscene" Work Prior to the Time That There Has Been a Judicial Determination of Its "Obscenity" Is Cruel and Unusual Punishment.

In *Furman v. Georgia*, 408 U.S.238, 309, 310, Justice Stewart, concurring, stated that the death sentences involved in those cases were "cruel and unusual in the same way that being struck by lightning is cruel and unusual". He pointed out that of all people convicted of rapes and murders in the years in question,

"the petitioners were among a capriciously selected random handful upon whom the sentence of death has in fact been imposed". Accordingly, he concluded that the Eighth and Fourteenth Amendments stood as a bar to the infliction of a penalty on so "wanton" and so "freakish" a basis. (408 U.S. at 310).

Justice Douglas, in his concurring opinion, stated that the Eighth Amendment "was concerned primarily with selective or irregular application of harsh penalties and that its aim was to forbid arbitrary and discriminatory penalties of a severe nature" (408 U.S. at 242). He emphasized that there is increasing recognition of the fact that "the basic theme of equal protection is implicit in 'cruel and unusual' punishments. 'A penalty . . . should be considered unusually imposed if it is administered arbitrarily or discriminatorily.'" (408 U.S. at 249). The high service rendered by the "cruel and unusual" punishment Clause of the Eighth Amendment "is to require legislators to write penal laws that are even-handed, nonselective, and nonarbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily. . . ." (408 U.S. at 256). Justice Douglas found the death penalty statutes unconstitutional because they "are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments" (408 U.S. at 257).

Justice Brennan, concurring, expressed similar views. The Eighth Amendment, he said, means "that the State must not arbitrarily inflict a severe punishment". This is so because "the State does not respect human dignity when, without reason, it inflicts upon people a severe punishment that it does not inflict upon others.

Indeed the very words 'cruel and unusual punishments' imply condemnation of the arbitrary infliction of severe punishments." (408 U.S. at 274).

It is plain that persons subject to the obscenity law are subject to severe punishment. At the present time, there is pending in the Court the case of *McCrary v. Oklahoma*, No. 72-1648 (41 L.W.3658), wherein a bookseller was sentenced to a 10-year jail term for possessing allegedly obscene books. In *Aday v. United States*, 388 U.S.447, the petitioner was sentenced to 25 years in jail for transporting allegedly obscene works. To a librarian, a criminal accusation is severe punishment, involving as it does the whole criminal process pursuant to which people are arrested, kept in jail for endless hours, and required to post bail.

To throw a librarian into the arena of the criminal courts to be exposed to public opprobrium, to be paraded before a jury for doing his job and to expect him to risk his freedom and security on the judgment of an uncontrolled jury selected without reference to their qualifications to appreciate literary values, is to subject the librarian to a game of Russian Roulette.

All of this uncertainty and unwarranted risk could be avoided if the State was required to initiate civil proceedings to determine whether the questioned work was obscene, before permitting the bringing of criminal proceedings. Such civil proceedings would adequately serve the purposes of the State in suppressing the circulation of allegedly obscene works without at the same time inflicting arbitrary criminal punishment on persons who cannot reasonably know in advance whether they are circulating constitutionally protected works or criminal works.

Conclusion.

The June 21, 1973 decisions mark a radical break from past decisions of the Court affording the broadest possible protection to books and other media of expression, regardless of their content. *Amicus* believes that this departure from traditional First Amendment principles was made without the Court having had the opportunity to consider the decisions' far-reaching chilling effect on librarians and others who traditionally circulate the press. Granting a Rehearing in which *amicus* may fully present its views would, we hope, prove helpful to the Court in formulating standards that conform to traditional principles and procedures for protecting freedoms of speech and press. These precious freedoms are "vulnerable to damaging but barely visible encroachments". In the case at bar, the encroachments are glaring, and carry the potential for extraordinary abuse. Accordingly, the Court should grant the Petition for Rehearing and reconsider its judgment herein.

Respectfully submitted,

WILLIAM D. NORTH,

E. HOUSTON HARSHA,

Attorneys for Amicus Curiae.

KIRKLAND & ELLIS,

Of Counsel.

17 83
ALL COPY

IN THE
Supreme Court of the United States
October Term, 1971

No. 71-1422

MURRAY KAPLAN,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

MOTION OF ASSOCIATION OF AMERICAN PUBLISHERS, INC., COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, INC., PERIODICAL AND BOOK ASSOCIATION OF AMERICA, INC., AMERICAN BOOKSELLERS ASSOCIATION, INC. and NATIONAL ASSOCIATION OF COLLEGE STORES, INC. TO FILE A BRIEF AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR REHEARING AND BRIEF ANNEXED

**EDWARD C. WALLACE and
WEIL, GOTSHAL & MANGES**
Attorneys for Amici
767 Fifth Avenue
New York, New York 10022

**HEATHER GRANT FLORENCE
ROBERT WEINER**

Of Counsel

TABLE OF CONTENTS

	PAGE
Motion in Support of Petition for Rehearing:	
Statement	1
The <i>Amici</i>	2
Interest of the <i>Amici</i>	4
Brief in Support of Petition for Rehearing:	
Interest of <i>Amici</i>	7
Summary of Argument	8
Argument	
Point I—The vagueness and breadth of the <i>Miller</i> test clearly infringe upon constitutionally protected areas	9
1. Deletion of the “utterly without redeeming social value” test	10
2. Use of local standards	12
Point II—The Court should allow the dissemination of sexually oriented materials to consenting adults in circumstances precluding exposure to minors and unwilling adults	19
Point III—To achieve the goals as set forth by the Court in the recent decisions it must clarify its holdings by setting guidelines	24

	PAGE
1. What are the local standards: state, county, city, town, or neighborhood?	26
2. On what basis is a jury to determine whether a work has "serious artistic, literary, political or scientific value"?	29
3. What does "sexual conduct specifically defined by the applicable state law" mean?	31
Conclusion	33

TABLE OF AUTHORITIES

Cases:

Ginzberg v. New York, 390 U.S. 629 (1968)	23
Jenkins v. Georgia (Georgia Supreme Court, July 2, 1973)	25
Kaplan v. California (No. 71-1422, June 21, 1973)	4, 9, 26
Katz v. United States, 389 U.S. 347 (1967)	21
Memoirs v. Massachusetts, 383 U.S. 413 (1966)	9, 19
Miller v. California (No. 7-73, June 21, 1973)	<i>passim</i>
Paris Adult Theatre v. Slaton (No. 71-1051, June 21, 1973)	4, 29, 32
Prince v. Massachusetts, 321 U.S. 158 (1943)	23, 24
Roth v. United States, 354 U.S. 476 (1957)	9, 11, 15, 19
Stanley v. Georgia, 394 U.S. 557 (1969)	20, 21

Constitution:

First Amendment	<i>passim</i>
-----------------------	---------------

Statutes:

New York Alcoholic Beverage Control Act, §65	23
New York Domestic Relations Law, §15	23
New York Election Law, §150	23
New York General Obligations Law, §3-101	23
New York Penal Law:	
§30.00(1)	23
§130.05	23
§130.25	23
§235.20	23
§235.21	23
§484-h	23
New York Vehicle and Traffic Law, §501(b)	23

Other Authorities:

<i>American Book Trade Directory</i> , R. R. Bowker Company, 20th Ed. (1971-1972)	15
---	----

The New York Times:

July 1, 1973, §2 (Arts and Leisure), "The Court's Impact on Movies"	14
July 4, 1973, §2	25, 27
July 7, 1973, §1	17

The Report of the Commission on Obscenity and Pornography	11
---	----

<i>Time Magazine</i> , July 2, 1973	25
---	----

Rule:

Supreme Court Rule 42	2
-----------------------------	---

IN THE
Supreme Court of the United States

October Term, 1971

No. 71-1422

MURRAY KAPLAN,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

MOTION OF ASSOCIATION OF AMERICAN PUBLISHERS, INC., COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, INC., PERIODICAL AND BOOK ASSOCIATION OF AMERICA, INC., AMERICAN BOOKSELLERS ASSOCIATION, INC. and NATIONAL ASSOCIATION OF COLLEGE STORES, INC. TO FILE A BRIEF AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR REHEARING

Statement

The Association of American Publishers, Inc. (hereinafter referred to as "A.A.P."), the Council for Periodical Distributors Associations (hereinafter referred to as "C.P.D.A."), the International Periodical Distributors Association, Inc. (hereinafter referred to as "I.P.D.A."), the

Periodical and Book Association of America, Inc. (hereinafter referred to as "P.B.A.A."), the American Booksellers Association, Inc. (hereinafter referred to as "A.B.A.") and National Association of College Stores, Inc. (hereinafter referred to as "N.A.C.S.") (collectively referred to herein as "*Amici*") hereby seek leave of this Court to file a brief as *amici curiae* pursuant to Rule 42 of the Rules of the Supreme Court of the United States, in support of the petition for rehearing filed by petitioner herein.

On July 2, 1973, counsel for the *Amici* wrote to Stanley Fleishman, Esq., counsel for petitioner, and to Burt Pineas, Esq., City Attorney of Los Angeles, California, counsel for respondent, requesting permission to participate as *amici curiae* in this proceeding. On July 5, 1973, counsel for petitioner granted such permission in writing. Counsel for respondent has not yet responded to the request.

The *Amici*

The Association of American Publishers, Inc. (A.A.P.) is a trade association organized under the laws of the State of New York. It is composed of publishers of general books, textbooks and educational materials. Its more than 260 members, which include many university presses and religious book publishers, publish in the aggregate the vast majority of all general, educational and religious books and materials produced in the United States. These works are distributed in thousands of bookstores, department stores, drug stores, newsstands and other outlets in towns, villages and cities throughout the United States.

The Council for Periodical Distributors Associations (C.P.D.A.) is an Illinois not-for-profit corporation which has been in existence for fifteen years. It is the national association of 500 local independent wholesale distributors of magazines, comics, paperback books and newspapers in every state in the United States.

The International Periodical Distributors Association, Inc. (I.P.D.A.) is a trade association organized under the laws of the State of New York. It is an association of twelve national periodical distributors who are each in the business of distributing or arranging for the distribution of paperback books and periodicals throughout the United States for ultimate distribution to retailers and the public.

The Periodical and Book Association of America, Inc. (P.B.A.A.) is a New York not-for-profit association for magazines and paperback books, who share a common interest in the sale of their product through independent wholesaler distribution channels throughout the United States.

The American Booksellers Association, Inc. (A.B.A.) is a trade association organized under the laws of the State of New York. It is a national association representing 3,968 booksellers, including all of the major ones. The members consist of chain operations, private bookstores, department store book departments and university bookstores.

The National Association of College Stores, Inc. (N.A.C.S.) is a trade association organized under the

laws of the State of Ohio. It is composed of stores serving more than seven million college students and faculty. The N.A.C.S. has 2,250 members, of which 1,700 are owned by universities or colleges. The other 550 are privately sponsored.

Interest of the *Amici*

This petition is for a rehearing of those issues before the Court in the above-captioned proceeding and, by necessity, those issues determined by the Court in *Miller v. California* (No. 70-73, June 21, 1973) and *Paris Adult Theatre v. Slaton* (No. 71-1051, June 21, 1973). None of the materials in any of these cases was either published or disseminated by any member of the *Amici*.

The *Amici* join in this petition because of the broad impact of this Court's decisions in *Kaplan* and the companion cases upon which the decision in *Kaplan* was based. The *Amici* believe that these recent "obscenity" decisions subject their members and readers and, indeed, all citizens to violations of their First Amendment rights.

The *Amici* regret that they were not present before the Court as an *amici curiae*, either individually or collectively, in any of the above mentioned cases. They did not participate because the materials under consideration in these cases were not representative of the books and materials published and/or distributed by their members and they did not believe that the Court would undertake to establish entirely new guidelines for the definition and regulation of obscenity on the basis of the materials in the cases before it.

The *Amici*, therefore, seek permission to participate in this petition for rehearing so they may bring to the attention of the Court the problems inherent in the recent decisions. Despite the Court's expressed intention of regulating the dissemination of only "hard core pornography," the *Amici* submit that four rulings in the recently decided cases will intrude upon the publication and dissemination of constitutionally protected materials. They are: (1) that the "utterly without redeeming social value" test is deleted, (2) that determinations may be made on the basis of local as opposed to national standards, (3) that the prosecution need offer no expert evidence with respect to the three tests of *Miller*, but may merely place the material in question in evidence and (4) that as far as even reading materials are concerned, the zone of privacy recognized is no greater than the home.

The *Amici* believe that the newly announced tests and standards for determining obscenity are far more vague than their predecessors. As such, they fall short of the due process requirement of fair notice and they will have a severe chilling effect on the publication and dissemination of constitutionally protected literary works. Moreover, they are certain to result in a whole host of new obscenity litigation with which state and federal courts and this Court will surely be overwhelmed.

In light of the destructive impact that these decisions will have on First Amendment rights, the *Amici* urge the Court to grant the petition so that it may reevaluate the threshold issue—the demands of the First Amendment versus the interest of the States to control the "quality of

life," "total community environment" and the "tone of commerce"—with the assistance of factual information including statistics on publishing and distribution that the *Amici* and other affected groups can provide upon such a rehearing. Yet even if the Court should reaffirm its initial policy determination, the *Amici* urge the Court to grant the petition so it may clarify those aspects of the recent rulings which leave the present tests, standards and procedures for proceedings against "obscenity" vague to the point that the stated intention of the Court to isolate and regulate only "hard core pornography" will not be achieved.

In view of the foregoing, the *Amici* seek leave to file the brief following hereafter.

Respectfully submitted,

WEIL, GOTSHAL & MANGES
Attorneys for Amici

By /s/ EDWARD C. WALLACE

EDWARD C. WALLACE

HEATHER GRANT FLORENCE
ROBERT WEINER

Of Counsel

IN THE
Supreme Court of the United States

October Term, 1971

No. 71-1422

MURRAY KAPLAN,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

**BRIEF OF ASSOCIATION OF AMERICAN PUBLISHERS, INC., COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, INC., PERIODICAL AND BOOK ASSOCIATION OF AMERICA, INC., AMERICAN BOOKSELLERS ASSOCIATION, INC. and NATIONAL ASSOCIATION OF COLLEGE STORES, INC. AS
AMICI CURIAE IN SUPPORT OF PETITION
FOR REHEARING**

Interest of Amici

This is set forth above in the motion to the Court.

Summary of Argument

1. The Court should reconsider the *Miller* test in light of its overbreadth and vagueness. The deletion of the "redeeming social value" test and the application of local as opposed to national standards will result in the suppression of constitutionally protected materials. Moreover, the *Miller* test creates serious problems of fair notice and it ignores the realities of the publishing and distributing process of most written materials.

2. Because of the inherent difficulties in isolating "obscene" materials from "non-obscene" materials, the Court should only permit regulation of the circumstances of the dissemination of sexually oriented materials to preclude exposure to minors and invasion of the privacy and sensibilities of unwilling adults. This approach will serve the States' interest to protect the "quality of life" and at the same time it will protect our constitutionally guaranteed freedom of expression.

3. The Court should, in the absence of a rejection of the *Miller* test, provide guidelines which clarify certain ambiguities in the June 21, 1973 decisions. To avoid abuse of the *Miller* test, the Court should clarify (1) the meaning of "local" standards, (2) the manner of determining "serious artistic, literary, political and scientific value" and (3) the nature of "conduct" that the States may proscribe and the manner in which that may be done.

ARGUMENT

POINT I

The vagueness and breadth of the *Miller* test clearly infringe upon constitutionally protected areas.

In remanding the *Kaplan* case to the State Court for further proceedings to determine whether the conviction is valid under the Court's tests in *Miller v. California*, this Court determined that all materials (including the printed word alone), and regardless of their manner of dissemination, are subject to the *Miller* test. That test is that the trier of fact must determine: "(a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value."

Although the three prongs of the *Miller* test do not differ substantially in approach from the prior three-pronged test of *Roth v. United States*, 354 U.S. 476 (1957) and *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), *Miller* does open the door for censorship of materials previously found to be entitled to First Amendment protection. In so doing, it aggravates the vagueness problem that has always surrounded attempts to define, isolate and regulate obscenity.

1. Deletion of the "utterly without redeeming social value" test

By determining that it is not constitutionally required for a work to be "utterly without redeeming social value" to be found "obscene," the Court has removed a test which provided a safeguard for those materials which some individuals might find "obscene" but which were clearly within the purview of the First Amendment. Substitution for that test with the *Miller* test that a work taken as a whole "lacks serious literary, artistic, political or scientific value" completely excludes from constitutional protection those materials containing sexual content which have philosophical, educational and/or entertainment value.¹ Much of what normal or average adults read, see at the movies and, indeed, watch on television arguably has no serious literary, artistic, political or scientific value. Yet, few would deny that such materials do have redeeming social value; they can be educational, entertaining, relaxing or otherwise rewarding to those individuals who voluntarily seek them out.

Indeed, the majority of this Court in the *Miller* case recognized this problem with respect to materials that the Court implies should not be found "obscene." In *Miller* (slip opinion at p. 11) the Court notes that we will have to rely on the jury system and traditional procedural safeguards to arrive at the proper decisions with respect to "medical books for the education of physicians and related personnel (which) necessarily use graphic illustrations and descriptions of human anatomy."

1. This is by no means an exhaustive list of areas which the Court excludes from constitutional protection.

The *Amici* submit that, if by the Court's own assessment of the *Miller* test, materials such as medical school textbooks are not clearly protected, it is clear that sex education materials published for and purchased by laymen are subject to censorship and likely to be banned in any number of communities. In excluding such materials from constitutional protection, the Court has veered far away from the underlying philosophy in the *Roth* decision. Based upon the Court's assertion in *Miller* that its goal is to isolate and control "hard core pornography" the *Amici* do not believe the Court meant to abandon a basic premise of *Roth* that "sex and obscenity are not synonymous." In *Roth*, the Court specifically noted that:

"Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind throughout the ages; it is one of the vital problems of human interest and public concern." (354 U.S. at 487)

Removing constitutional protection from sex education materials is clearly one of the problems with the new *Miller* test. While this Court has chosen to rely on the individual statements of a few of the dissenting members from the Commission on Obscenity and Pornography's Report as to the effect of sexually explicit materials on the tone of society, the *Amici* submit that no evidence, or indeed, documented arguments have been advanced to the effect that sex education materials, which in good part are published by religious book publishers, have any detrimental effect on public morality. Indeed, the evidence is quite to the contrary.²

2. See Part Three, Section III of the Report of the Commission on Obscenity and Pornography.

Apart from the whole category of professionally prepared sex educational materials, the *Miller* test places in jeopardy those works of fiction over which battles have long ago been fought and won. Not only is there now a serious question as to whether works by D. H. Lawrence, Henry Miller, James Joyce and, indeed, Rabelais and Boccaccio, to name a few, would be entitled to constitutional protection under the *Miller* test,³ but replacement of the "redeeming social value" test with the "serious literary, artistic, political or scientific" test leaves in doubt the status of many works which have not been tested, but as to which there has been little question as to merit or literary value. A principal reason for this confusion results from the fact that the Court in *Miller* implied that each jury could make a determination as to the literary, artistic, political or scientific value of a work and its seriousness simply by assessing the materials in question on the basis of the standards of their own communities.⁴

2. Use of local standards

This use of local standards raises the next disturbing aspect of the *Miller* test—that determinations of obscenity may be made by the jury applying local as opposed to national standards.⁵ By allowing local determinations of ar-

3. The weight to be applied to prior findings of constitutional protection of such works will be covered in Point III below.

4. Confusion with respect to the standard to be applied in determining whether a work has "serious artistic, literary, political or scientific value" will be discussed in Point III below.

5. In Point III below, the *Amici* will set forth the confusion resulting from the Court's failure to specify whether local standards must be State standards or whether they may be so local as to encompass countries, cities, towns, villages or neighborhoods.

tistic, literary, political and scientific value, the Court has, perhaps, inadvertently, embarked on a path which will result in the destruction of important aspects of American cultural life. It would indeed appear possible that some works of a Philip Roth or John Updike would be found to have serious literary value in one part of the country and not in another. If a national standard is not controlling as to these issues of literary criticism, some courts and juries in parts of the nation will deprive their residents of materials which have been found by nationally recognized literary critics as well as other courts and juries in other parts of the nation to be highly serious and significant. Not only will such communities be dictating moral standards to their residents, but they will be dictating intellectual standards as well.

In addition to the broad constitutional problems resulting from allowing some to impose moral and intellectual standards on others, the practices of the publishing and distributing industries are simply unable to accommodate a variety of standards among geographical sections of the country. For example, the materials published by members of the A.A.P. are disseminated on a national basis. Compliance with the standards of those communities which restrict access to sexually explicit materials will set the standard for materials published for all parts of the nation, including those communities which may determine that adults should be allowed access to a broad spectrum of sexually oriented materials. Hence, as far as books are concerned, the Court's belief (expressed in *Miller*, slip opinion at p. 18, fn. 13) that local community standards will not result in any greater suppression, and perhaps

less, in those communities where sexually explicit materials are acceptable is ill-founded.

Unlike local newspapers which can tailor their content to the community they serve and unlike films in which footage can be cut to satisfy community needs, books are printed in only one form.⁶ The contents of books cannot be modified, without prohibitive expense, to meet the varying standards of different communities. As a result, the only safe route for publishers to follow is to limit the sexual content of all their publications in such fashion that their works will not affront even the most restrictive of communities.

While the *Amici* require further time to assemble a complete statistical analysis of the manner in which most publications are distributed, at this juncture some statistics are available. The *Amici* urge the Court to grant this petition so that further concrete evidence may be presented. According to statistics gathered by the A.A.P. for 1972, the major trade book publishers distributed their products throughout the nation as a whole in the following manner: 43.5% were distributed by the publishers directly to bookstores throughout the country. Another 9% were distributed directly by the publishers to libraries and other institutions including schools, colleges and universities.

6. The special problem for book publishers has been recognized by the film critic Vincent Canby in *The New York Times*, "The Court's Impact on Movies," July 1, 1973, §2 (Arts and Leisure) at 28 in which he states:

"Book publishers will be in an even tougher situation since, although offending footage can be clipped from a movie print and later replaced, it's not possible to remove paragraphs temporarily from copies of a novel that might go against the grain in—say—the township of Pontoon in upper New York State."

41.6% were delivered to national wholesalers for distribution. With respect to the distribution of paperback books, approximately 75% were distributed by the publishers to wholesalers and approximately 25% were distributed directly by the publishers to outlets such as chain stores, bookstores and institutions.

Since the distribution of both trade and paperback books is divided between distribution directly to outlets and distribution to wholesalers, it is clear that distribution to accommodate local standards would require a total overhaul in the national distribution system. This affects not only the national publishers and distributors but the wholesalers and retailers as well. Arguing hypothetically that the standards of each community could be discerned *vis-à-vis* a given book prior to distribution, the distribution networks simply could not accommodate such decisions in any practical or economic fashion. The *Amici* submit, however, that national publishers, distributors and wholesalers will never be able to determine the acceptability of most books and materials in any community until after distribution has occurred.

Moreover, it is entirely impractical to assume that the local retailers are familiar with the content and character of all books distributed to them, whether by the publisher or wholesaler, to determine whether or not each title falls within the local community standards. Many bookstores carry tens of thousands of titles at a time. Moreover, while the approximately 11,000 bookstores in the United States⁷ are major outlets for books, it is now commonplace to

7. *American Book Trade Directory*, R. R. Bowker Company, 20th Ed. (1971-1972).

offer books for sale in numerous retail outlets whose primary business is the sale of merchandise other than books. The nominal book retailers must, therefore, rely entirely upon the judgment of others in deciding what books to carry.

And yet, it is this system of mass market distribution covering the entire United States that has created the opportunity to have paperback books distributed in millions of copies with the consequential public benefits of cheaper book prices and freer access to books. Undertaking all of the steps necessary to tailor distribution according to local standards (including legal expenses in trying to determine each local standard as well as business expenses required to restructure the system) would be so costly that the price of books will skyrocket and the public, as well as the publishers, distributors, wholesalers and retailers, would suffer.

Since a total restructuring of the mass marketing distribution system is virtually impossible, the publishers' only alternative is to tailor the contents of all of the materials they publish to the standards of the most restrictive communities in the nation. Consequently, this self-censorship will result in the most restrictive communities establishing *de facto*, if not *de jure*, the standard for the entire nation. The *Amici* submit that this result, which flows directly from the local standards holding of *Miller*, will result in the clear infringement of First Amendment rights.

Even prior to this Court's decision in *Miller*, the problems resulting from small groups dictating the content of materials to be read by others is apparent in the area of

textbook adoption. There are some 21 States in which the State determines what textbooks may be used in the school systems throughout that State. This sort of small group rule has been apparent in such broad areas as scientific and political content. Indeed, only a week ago a controversy over the direction of Arizona's public education flared into national prominence when the State Board of Education announced tentative approval of the following policy:⁸

"Textbook content shall not interfere with the school's legal responsibility to teach citizenship and promote patriotism. Textbooks adopted shall not include selections or works which contribute to civil disorder, social strife or flagrant disregard of the law."

In the response to opposition to this policy, its advocates have justified it as "morally correct."

Just as there is no place under the First Amendment for minority or indeed majority impositions of standards over the content of political materials which only foster thought and perhaps controversy, there should be no exception for the imposition by individuals of their own moral standards in the area of sex related materials. Yet, past experience shows that, particularly with respect to literary anthologies, textbook adoption will be an area in which claims of "obscenity" as to the content of some works included, will result in the suppression of whole anthologies. The *Amici* fear that the Court's recent rulings will only enhance the view, and hence the fact, that a few can make determinations for the many even as to materials which are clearly covered by the First Amendment guarantees. The textbook adoption situation is, we fear, an indication of the

8. *The New York Times*, July 7, 1973 §1 at 17.

treatment that adult reading materials will receive under the June 21, 1973 decisions.

The problems created by the *Miller* tests and the application of local standards, which have only been touched on lightly above, are those of overbreadth and vagueness. The *Amici* have only indicated the reasons for fearing a severe chilling effect resulting from these problems. They have not even touched upon the serious due process issues that result from the lack of notice and fair warning to those who will be criminally charged with the dissemination of materials which may now be encompassed by the *Miller* test and the heretofore unknown determinations of the community. In this regard, the *Amici* are persuaded that those aspects of the dissenting opinions of Justices Douglas and Brennan⁹ pointing to failure of the new tests to give the required "fair warning" raise issues which mandate further consideration.

In view of the foregoing, the *Amici* respectfully request that the Court grant the petition for rehearing and allow the *Amici*, as well as others, the opportunity to brief and document these points for consideration by the Court.

9. See *Miller*, dissenting opinion of Justice Douglas (slip dissent at pp. 5, 7) and *Paris Adult Theatre* dissenting opinion of Justice Brennan (slip dissent at pp. 14-18).

POINT II

The Court should allow the dissemination of sexually oriented materials to consenting adults in circumstances precluding exposure to minors and unwilling adults.

The Court in the *Miller* and its companion decisions has explicitly recognized that a fine line exists between protected and unprotected speech. In an effort to determine when speech falls short of First Amendment protection, the Court has in *Miller* proposed a three-pronged test. As shown above, this test is seriously deficient. Indeed, Justices Brennan, Marshall and Stewart have determined that the line cannot be drawn with the degree of definitiveness required to safeguard protected speech.

The *Amici's* failure to appear as an *amicus curiae* when these cases were heard by the Court was in large measure based on the belief that *Roth* and *Memoirs* did draw the line, if not clearly, at least safely in terms of First Amendment considerations. The recent decisions, both the majority and dissent, have caused the *Amici* to reevaluate their position. The *Amici* are persuaded that only the approach adopted by the minority of the Court will satisfy First Amendment commands.

To avoid the inherent difficulties surrounding the *Miller* approach to the obscenity problem, the *Amici* submit that the Court should abandon the *Miller* test and face the reality that it is impossible to define "obscenity" with such clarity that materials which fall within the protection of

First Amendment guarantees are not suppressed along with "obscene" materials. Accordingly, the *Amici* suggest that this Court solely allow regulation of the circumstances of dissemination to avoid exposure to minors and intrusion on the privacy and sensibility of adults offended by pandering and commercial promotion.¹⁰ This approach would sidestep the morass of problems caused by the most recent attempt, as well as all others, to separate out "obscene" materials in order to suppress them.

The *Amici* submit that the "obscenity problem" can be effectively controlled by application of the principles enunciated in this Court's decision in *Stanley v. Georgia*, 394 U.S. 557 (1969). In the *Stanley* decision, the Court recognized the right of an adult to read any book in the privacy of his home without interference by the State. The underlying premise of *Stanley* was this Court's desire to protect First Amendment rights from an unjustified intrusion of those rights by the State.¹¹ These rights include not only

10. The States may have an interest in limiting the area of dissemination of these sexually oriented materials so that minors are protected and the privacy of unconsenting adults is protected; legislation accomplishing these goals is easily drafted.

11. The Court in *Stanley* stated in pertinent part:

"It is now well established that the Constitution protects the right to receive information and ideas. * * * Moreover, in the context of this case—a prosecution for mere possession of printed or filmed matter in the privacy of a person's own home—that right takes on an added dimension. For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions in to one's privacy (394 U.S. at 564).

* * *

"Nor is it relevant that obscene materials in general, or the particular films before the Court, are arguably devoid of any

(footnote continued on next page)

the right to read books, but the right to view films as well (394 U.S. at 565). The First Amendment specifically protects the individual's right to receive information and ideas (394 U.S. at 563). These rights are rights of people, not places. *Cf. Katz v. United States*, 389 U.S. 347, 351 (1967). These rights can best be protected by controlling the circumstance of dissemination of sexually explicit materials, rather than by outright suppression. The Court's recent limiting of *Stanley* as expressed in the recent rulings fails to abide by *Stanley's*, and indeed the First Amendment's, underlying philosophy. The *Amici* fully agree with and support the position taken by petitioner in Points 1a and 1b of the Petition for Rehearing to this effect.¹²

Stanley stands for the simple proposition that an adult should be free to peruse all types of expression whether it be obscene or not. In order to protect this fundamental right, the *Amici* submit that access to all types of expression be permitted within allowable bounds designed to protect minors and adults who would be offended by sexually oriented expression. This approach would serve a dual purpose: it would protect our fundamental First Amendment rights and, at the same time, allow the States to regulate intrastate commerce, protect the public environment and restrict the dissemination of sexually oriented materials

ideological content. The line between the transmission of ideas and mere entertainment is much too elusive for this Court to draw, if indeed such a line can be drawn at all. * * * Whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts" (394 U.S. at 566).

12. Although only Points 1a and 1b are mentioned in context, the *Amici* support the entire petition.

so that minors and non-consenting adults are fully protected.

The Court in the *Miller* opinion questions the practicality of this approach because (1) the avowed difficulty of determining which materials are subject to commercial regulation of any form still exists and (2) the Constitution does not distinguish between a willing "adult" one month past the State's legal age of majority and a willing "juvenile" one month younger. Neither of these criticisms affect the viability of this alternative.

The *Amici* concede that the difficulty of separating protected speech from unprotected speech still exists. However, the recommended alternative does not provide for suppression of unprotected speech, but simply for regulation of its commercial dissemination—zoning, if you will. Thus, protected speech which borders on the periphery of the First Amendment will not be suppressed. At most, an adult will have to make a conscious determination whether to view or hear the speech, but at least he will have the right to do so.

With respect to the second criticism raised by the Court, the *Amici* submit the police power of the State provides the necessary authority by which the State can distinguish between an "adult" and a "juvenile". The dichotomy between adult and juvenile has always been a matter of clear line-drawing. Thus, some States have enacted drinking laws which require that individuals be twenty-one in order to drink at a public place; others only require the individual to be eighteen. Similarly, statutory

rape laws determine when a female can consent to intercourse and when her consent will have no force. Indeed, State law determines when an individual can enter into a contract, be it marriage or otherwise, and when an individual needs parental consent. Thus, State law can clearly delineate between adults and minors in this area as well.¹³

Indeed, this Court has continually upheld the State's power to draw such lines. *Ginzberg v. New York*, 390 U.S. 629, 638 (1968); *Prince v. Massachusetts*, 321 U.S. 158, 170 (1943). In the *Ginzberg* case, *supra*, New York State sought by legislation to prevent the sale of certain sexually oriented materials to minors under the age of 17. In finding §484-h of the Penal Law of New York constitutional, the Court said:

"The well-being of its children is of course a subject within the State's constitutional power to regulate, and, in our view, two interests justify the limitations in §484-h upon the availability of sex material to minors under 17, at least if it was rational for the legislature

13. For example, New York makes numerous distinctions as to rights, privileges and protections based upon age, in addition to those protections established for minors relating to the sale of indecent materials (§§235.20, 235.21 Penal Law (McKinney's 1967)). See, *e.g.*, §15 Domestic Relations Law (McKinney's 1964) prohibiting the marriage of males under the age of 16 and females under 14; §3-101 General Obligations Law (McKinney's 1964), permitting disaffirmance of contracts made by persons less than 18 years of age; §65 Alcoholic Beverage Control Act (McKinney's 1970) prohibiting the sale of any alcoholic beverage to a person under the age of 18; §150 Election Law (McKinney's Supp. 1972) requiring that a person be 21 years of age on Election day in order to vote; §501(b) Vehicle and Traffic Law prohibiting any person less than 18 years of age from obtaining a driver's license; §30.00(1) Penal Law (McKinney's 1967) stating that a person less than 16 years of age is not criminally responsible for his acts; §130.25, which makes intercourse with a female of less than 17 years a crime, and §130.05 which states that a person less than 17 years of age is incapable of consent to sexual conduct.

to find that the minors' exposure to such material might be harmful. First of all, constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. 'It is cardinal with us that the custody care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' *Prince v. Massachusetts, supra*, at 166, 88 L. Ed. at 652." (390 U.S. at 639)

• • •

"The State also has an independent interest in the well-being of its youth." (390 U.S. at 640)

There can be no question that if it chooses, the State can distinguish between the "juvenile" and the "adult." The *Amici* therefore respectfully submit that the reasons presented by the majority of the Court to rebut the compelling arguments advanced by the dissenting Justices do not withstand further analysis.

POINT III

To achieve the goals as set forth by the Court in the recent decisions it must clarify its holdings by setting guidelines.

The decisions rendered in *Miller* and its companion cases have engendered tremendous confusion among educators, authors, publishers, distributors and law enforcement officials as to the meaning and proper implementation of this Court's three-pronged test. Failing a determination to reconsider the whole approach to the "obscenity problem" this Court should, at the very least, set specific guidelines

by which all affected groups can govern their future conduct. One need only read the newspapers or listen to radio or television to realize that the Court's decisions have been abused by law enforcement officials and that, because of the vagueness of certain aspects of the decisions, First Amendment freedoms have been severely undermined.

Within two weeks of this Court's rulings, the Georgia Supreme Court upheld the pornography conviction of a theater operator who showed the movie "Carnal Knowledge," an R-rated movie which received high critical acclaim.¹⁴ The rationale of the Georgia court was that the local community standards were the determining factors in deciding whether the material in question was obscene. Similarly, in Virginia the Albermarle County authorities ordered shopkeepers to remove magazines such as *Playboy* or *Penthouse* or face arrest. Similar precipitous actions by local authorities elsewhere, pointedly show the havoc created by the decisions.

The chaos created by the *Miller* decision among the affected groups who publish and distribute nationally has been documented by magazine and newspaper reports.¹⁵ Thus *Time Magazine*, July 2, 1973, states in its Law Section:

"That local standard rule could conceivably turn into a nightmare for publishers, film makers and other distributors of mass-circulation material. Robert Bernstein, head of Random House, sees the decision as 'a call to arms to every crazy vigilante group in this

14. *The New York Times*, July 4, 1973, §2 at 40; *Jenkins v. Georgia* (Georgia Supreme Court, July 2, 1973).

15. The newspaper and magazine articles referred to in this brief are only a representative sampling of the hundreds of news stories that appeared in the weeks following this Court's decisions.

country.' Michigan Attorney General Frank Kelley warns, 'This really sets us back in the dark ages. Now prosecuting attorneys in every county and state will be grandstanding, and every jury in every little community will have a crack at each new book, play and movie.'

"Many works will clearly be acceptable in some parts of the nation but not in others. Disparate rulings would force distributors into an uncomfortable choice—either bowing to the strictest law, forfeiting part of their business, or circulating various versions of a work. 'Community enforcement may result in hundreds of different film prints distributed around the country,' predicts Producer Russ Meyer, a creator of soft core nudie flicks. Producer-Director Stanley Kramer predicts that the decision could bring chaos to many movie companies; Irwin Karp, an attorney for the Authors League of America, said that publishers will be put under 'real restraints' " (at p. 45).

In seeking clarification of the rulings, the *Amici* merely highlight below certain questions on which answers are needed to effectuate the avowed purpose of *Miller* and to minimize the abuse of the Court's directions.

1. What are the local standards: state, county, city, town, or neighborhood?

In *Kaplan* this Court held that it was proper for the prosecution to offer evidence and for the Court to charge the jury with reference to standards of the State of California. Furthermore, in the second prong of the *Miller* test there is the requirement that the material prohibited be "specifically defined by the applicable state law." Moreover, in *Miller* the Court states: "To require a State to

structure obscenity proceedings around evidence of a *national* 'community standard' would be an exercise in futility" (Slip opinion at p. 16, emphasis in original).

Despite these rather clear indicia that the Court intended to abandon a national standard in favor of State standards, the decisions have been construed by some groups to allow the creation of separate standards for each community within each State. The Court gave rise to this construction by stating in *Miller* that:

"It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City" (Slip opinion at p. 17).

The question arises as to whether local communities such as counties, cities and towns may enact ordinances prohibiting the depiction of certain sexual conduct which is permitted by the applicable State law. While efforts to draft and implement such local directives are already underway,¹⁶ the *Amici* believe that such a degree of fracturing and local determination was not intended by the Court. For, certainly the practical and accompanying chilling effect problems of varying State standards, as outlined in Point I above, would be magnified to incomprehensible proportions. The *Amici* submit that there is no way, short of distribution of only locally created materials, that reading or viewing materials can be tailored to satisfy the demands of each community. The *Amici*, therefore, urge the Court to clarify that only duly enacted State legisla-

16. In Albermarle County, Virginia, the commonwealth attorney has taken such steps. See *The New York Times*, July 4, 1973, §2 at 40.

tion may form the basis for obscenity proceedings within each State.

While a clarification that State legislation sets the outer limit for proceedings within each State will go far to clarify the issue as to the meaning of local standards, a further question remains. When judging materials before it in light of the applicable State law, must the jury base its determination on the existing State standards or may it judge the materials according to a more local standard? Here again, the *Miller* ruling holds that State standards are constitutionally adequate, yet there is an unresolved issue as to whether State standards—as opposed to local standards—are constitutionally required.

The *Amici* presume that the Court did not intend to allow juries sitting in different counties within the same State to judge the same or similar materials against varying standards. To allow such variation will amount to decisions being made in each case on the basis of the standards of the individuals on each jury. The consequence is, of course, no standard against which publishers, distributors and retailers can gauge materials even if they are familiar with the applicable State legislation. The due process and chilling effect problems raised by the dissenting Justices and touched upon in Point I above would be aggravated to crisis proportions.

The *Amici*, therefore, submit that the Court must clarify that local standards can be no more local than the fifty States with respect to both the controlling legislation and the community standard applying that legislation to the materials in question.

2. On what basis is a jury to determine whether a work has "serious artistic, literary, political or scientific value"?

The question posed above is not unrelated to the dilemma as to what standards a jury is to apply in making determinations. The Court specifically states in *Miller* (Slip opinion at pp. 15-16) that national standards as to "what appeals to the 'prurient interest' or is 'patently offensive' " are not required. It does not so specifically state with respect to assessments of "serious artistic literary, political or scientific value."

And yet, there are indications in *Miller* and its companion cases that local standards can constitutionally govern determinations of this third prong of the *Miller* test. In setting forth the three *Miller* tests, the Court notes that these must be "the basic guidelines for the trier of fact." (Slip opinion at p. 9). Furthermore in *Paris Adult Theatre* (Slip opinion at pp. 6-7), the Court held that the prosecution need not present evidence other than the material itself.

The *Amici* submit that it is untenable for juries to make determinations of "value" solely by viewing materials in the light of local standards. The question of value—even more than prurient appeal or patent offensiveness—is a question of law as well as fact. The question of value is one in which expert evidence is required and to which national standards must be applied. At the least, the *Amici* submit that expert evidence by the prosecution must be presented to rebut any such evidence offered by the defense on the issue of value. Moreover, no less than the usual strictures as to the weight to be given to any such evidence must be applied.

In this regard, the *Amici* urge the Court to clarify whether pre-*Miller* findings of constitutional protection for certain materials still have validity and, if not binding, whether they have probative weight. If this is not the case, the *Amici* predict that the courts will again be asked to determine whether the works of D. H. Lawrence, Henry Miller and others are still within the area of protected expression.

Moreover, a serious question exists as to whether in part (c) of the *Miller* test, the Court meant that allegedly obscene materials be evaluated solely on the basis of "serious literary, artistic, political or scientific" merit or whether the merits of the work can be measured in other areas such as educational, philosophical or entertainment terms as well. There is no question that a vast majority of the works disseminated in the mass media fields of television, radio and movies have no lasting value in any of the four areas categorized by the Court. Yet these works which are widely disseminated play an important role in the life of the general public. It is the rare television or radio script, whether the subject is sex or the Wild West, which is written for the purpose of contributing to the fields of literature, science, the arts or politics. The underlying goal of any script is to entertain the viewer. The *Amici* cannot believe that the Court meant to exclude from the consideration of whether a work is obscene, its value in areas other than the four listed in the *Miller* opinion.

In short, the *Amici* respectfully submit that the third prong of the *Miller* test requires greater clarification. As the opinions of the Court are now being interpreted, the

whole determination of value will be nothing more than a judgment based on the taste of the jurors. To prevent "reducing the rule of law to a matter of taste,"¹⁷ the Court should clarify that (1) national standards apply to this determination, (2) the determination must be made on available expert evidence, (3) prior findings of constitutional protection still control and (4) the value which protects sexual materials may encompass areas in addition to the artistic, literary, political and scientific.

3. What does "sexual conduct specifically defined by the applicable state law" mean?

The Court acknowledges in *Miller* that the permissible scope of regulation of obscene materials must be limited to works which depict or describe "sexual conduct" (Slip opinion at p. 9). Yet the Court goes on to suggest that it is possible for a State to include in its statute, the regulation of "lewd exhibition of the genitals." (Slip opinion at p. 11). The Court then takes a third position by saying:

"Sex and nudity may not be exploited without limit by films or pictures exhibited or sold in places of public accommodation * * *." (Slip opinion at p. 11).

Thus, the Court has in three pages offered three totally separate interpretations as to what a State can or cannot regulate. Under the opinion of the Court, it remains unclear whether a State by appropriate statute can regulate materials which deal with:

(a) sexual conduct between two or more participants; or

17. Petition for Rehearing, Point 3.

(b) exhibition of human genitals in a sexually aroused state; or

(c) depiction of the human body in its natural state.

The *Amici* urge the Court to clarify its position with respect to the above categories. Surely the Court recognizes that the undraped human form has been the subject of artistic creations throughout history in all forms of the literary, fine and performing arts. To allow States to regulate whether, for example, the unadorned female breast is obscene is to open the floodgates of repression with respect to all of the creative arts. The appreciation of the human form by photography or painting is in no way obscene. Yet the very words of this Court can be twisted to suppress such works.¹⁸

A second problem of construction with respect to test (b) of *Miller* has arisen. In reply to Mr. Justice Brennan's argument that the Court's decision in *Miller* will require complete redrafting of existing State "obscenity" legislation (*Paris Adult Theatre*, slip opinion fn. 12 at pp. 22-23), the Court states, "existing state statutes, as construed heretofor or hereafter may be adequate" to satisfy the constitutional tests enunciated in *Miller* (slip opinion fn. 6 at p. 9). The *Amici* are puzzled by this apparent invitation to prosecutors, judges and juries to determine whether, on an *ad hoc* basis, existing statutes, which clearly fail on their face to comply with the *Miller* test, can form the basis of constitutionally permissible proceedings. If this is what the Court intends, then the constitutional problems will be le-

18. Indeed, the wheels of repression under the banner of the *Miller* decision have already begun to turn. See pages 24-26, *supra*.

gion. In addition to the already highlighted problems of fair notice and the chilling effect on First Amendment rights, part (b) of the *Miller* test will also endanger the constitutional right to due process under the law as required by the Fourteenth Amendment and the constitutional protection against *ex post facto* laws.

The *Amici* respectfully urge the Court to clarify that (1) only sexual conduct and not mere depictions of the nude human body may be regulated and (2) that States may not use constitutionally deficient statutes in proceedings aimed at suppressing allegedly obscene material simply by adjusting construction to satisfy *Miller* on a case-by-case basis.

Conclusion

In view of the foregoing, the Association of American Publishers, Inc., Council for Periodical Distributors Associations, International Periodical Distributors Association, Inc., Periodical and Book Association of America, Inc., American Booksellers Association, Inc. and National Association of College Stores, Inc. respectfully request the Court (1) to grant the petition for rehearing, (2) to allow the *Amici* to participate in such rehearing, and (3) to reassess or, at least, clarify the prior rulings in this case and its companion cases.

Respectfully submitted,

EDWARD C. WALLACE and
WEIL, GOTSHAL & MANGES
Attorneys for Amici
767 Fifth Avenue
New York, New York 10022

HEATHER GRANT FLORENCE
ROBERT WEINER

Of Counsel

INDEX

	PAGE
Motion for Leave to File Brief as <i>Amicus Curiae</i> ..	1
Interest of The Authors League	3
Summary of Argument	4
POINT I—Misinterpretations of the <i>Miller</i> Guidelines Should be Corrected Now, by Clarification of the Opinion on Rehearing, to Forestall Suppression of First Amendment Rights	5
POINT II—The Misinterpretations of "Community Standards"	6
"Local" Community Standards Cannot be Applied	7
Community "Standards" Cannot be Legislated	9
POINT III—Misinterpretations of the "Serious Value" Test	10
POINT IV—Rehearing Should be Granted to Reconsider The Requirement of a Prior Civil Determination of Obscenity	13
POINT V—On Rehearing, The Court Should Adopt the Conclusions Reached by Justice Brennan in <i>Paris Adult Theatre I</i>	14
CONCLUSION	16

TABLE OF AUTHORITIES

Cases

<i>Ginsburg v. United States</i> , 383 U.S. 463 (1966) . . .	14
<i>In Re Giannini</i> , 69 Cal. 2d 563, 72 Cal. Rep. 655 446 P.2d 535 (1968); cert. den. 395 U.S. 910 (1969)	8
<i>Jenkins v. The State</i> , Sup. Ct. of Georgia (not off. reported)	5, 7, 13
<i>Kirkpatrick & Dargis v. People of the State of New York</i> , 32 N.Y. 2d 17	13
<i>Müller v. California</i> , 41 LW 4933	5, 6, 7, 8 <i>passim</i>
<i>Paris Adult Theatre I v. Slaton</i> , 41 LW 4937	14, 15
<i>Roth v. United States</i> , 354 U.S. 476 (1957)	9, 14

United States Constitution

First Amendment	5, 6, 9, 11 <i>passim</i>
---------------------------	---------------------------

Other

Publishers Weekly, June 2, 1969, p. 59	12
American Library Association (<i>The Future of Gen- eral Adult Books and Reading in America</i>) 1970; p. 92	12
Encyclopedia Britannica, 1971; Vol. 18, p. 979	12

IN THE
Supreme Court of the United States

October Term, 1971

No. 71-1422

MURRAY KAPLAN,

Petitioner,

—against—

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

**Motion for Leave to File Brief
As Amicus Curiae**

The Authors League of America respectfully petitions the Court for leave to file the annexed brief *amicus curiae*. The League is a national society of professional authors and dramatists. One of its principal purposes is to express the views of its members in cases involving the rights of free speech and press, and the freedoms to read books and view plays and films. The Court's decisions in *Miller v. California* and this case significantly affect those rights and freedoms, and the creative activities of many League members.

The Authors League believes that rehearing should be granted to clarify certain aspects of the opinion which

have been, and will be, grossly misunderstood by legislators, judges and prosecutors. While petitions for rehearing may not be the usual method of resolving such problems of interpretation, the widespread consequences of landmark opinions which create new First Amendment guidelines are not usual either. The new standard of *Miller v. California* will shape state legislation, the policies of prosecutors and the decisions of courts. There are misunderstandings of the guidelines which will produce unconstitutional statutes and prosecutions. We urge that the Court clarify its decision now to forestall them. For if it waits until unconstitutional convictions reach it many months from now, booksellers, librarians and theatre owners will needlessly suffer pressures, prosecutions, heavy legal expenses and even jail terms and fines; and many adults will be deprived of their rights to read and see works that are entitled to First Amendment protection under the *Miller* guidelines.

Therefore, The Authors League respectfully seeks the Court's permission to file the annexed brief *amicus curiae*. The Authors League has been advised by Stanley Fleishman, Esq., attorney for Petitioner, that he consents to the filing of this brief. Burt Pines, Esq., attorney for Respondent has not indicated, in response to the League's request, whether he would consent to its filing.

Respectfully submitted,

IRWIN KARP

Attorney for The Authors League
of America, as Amicus Curiae

234 W. 44th Street

New York, New York 10036

IN THE
Supreme Court of the United States

October Term, 1971

No. 71-1422

MURRAY KAPLAN,

Petitioner,

—against—

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

**Brief of The Authors League of America
as Amicus Curiae**

INTEREST OF THE AUTHORS LEAGUE

The Authors League is a national society of professional writers and dramatists. One of its principal purposes is to express the views of its members in cases involving the rights of free speech and press, and the freedoms to read books and view plays and films. The Court's decisions in *Miller v. California* and in this proceeding significantly affect those rights and freedoms, and the creative activities of innumerable authors.

SUMMARY OF ARGUMENT

I. Rehearing should be granted to eliminate misunderstandings by courts and legislators concerning the appropriate community standard to be applied, the effect of the standard, and the function and application of the "serious value" test—under *Miller v. California*.

II. Courts and legislators have erroneously assumed that "local"—rather than state-wide—community standards may now be applied; and have misinterpreted *Miller* as permitting states or local communities to establish such standards by legislation.

III. A jury or judges cannot determine that a work lacks serious literary, artistic, scientific or political value by applying contemporary "community standards" or their own subjective judgment.

IV. Under the First Amendment, a bookseller, librarian or theatre owner cannot be criminally prosecuted for distributing a book or film if it has not previously been adjudged obscene in a prior civil, adversary proceeding.

V. The First Amendment prohibits any restraint on the distribution of books and films to adults who wish to read or view them, when the distribution is made by means that do not thrust the material on unwilling adults.

POINT I

Misinterpretations of the *Miller* Guidelines Should be Corrected Now, by Clarification of the Opinion on Rehearing, to Forestall Suppression of First Amendment Rights.

There has already been considerable misinterpretation of the revised constitutional standard, established in *Miller v. California*, 41 LW 4933 to regulate state obscenity statutes and prosecutions. There is bound to be more. For example, the Supreme Court of Georgia has erroneously interpreted *Miller* as permitting the application of "local" community standards — rather than a state-wide community standard — in judging the alleged prurient interest and patent offensiveness of the widely acclaimed film, "Carnal Knowledge". (Jenkins v. The State, July 2, 1973). Congressman Thaddeus Dulski* informed the House of Representatives, on June 29th, that "the Court now says that the offensiveness of material — whether it is obscene — can be judged on the basis of local community standards." (Cong. Record, June 30, 1973; p. E4537). Other legislators have similarly misconstrued the "community standard" aspect of the guidelines.** There is also widespread confusion as to the nature of the "community standard".

Furthermore, there is a serious threat — as evidenced by the *Carnal Knowledge* decision — that legislators, prosecutors and judges have not understood (i) that the literary, artistic, political or scientific value of a book is not to be determined by "community standards"; and (ii) that a book or film which has "serious" literary or artistic value

* Mr. Dulski is chairman of the Committee on Post Office and civil service, which considers much anti-obscenity legislation.

** Representative Sikes (Cong. Record, July 11, 1973; R. H5993); Representative Edwards (Cong. Record, June 28, 1973, p. H5639).

is (under the guidelines) still protected by the First Amendment against suppression, even though it be patently offensive or pruriently appealing.

These misinterpretations of the guidelines will produce statutes, prosecutions and convictions that violate the First Amendment as construed by *Miller*. Booksellers, librarians and theatre owners who are threatened, prosecuted or convicted because of these erroneous interpretations will suffer substantial and unredressable injury—if the Court waits long months or years until the consequences of the misinterpretations are presented to it by appeals from unconstitutional convictions. This needless suffering can be avoided if the Court grants rehearing and clarifies its opinion in the respects indicated below. Since the *Miller* guidelines were intended to mark the limits of obscenity laws and trials, it is essential that their application be clearly understood, now.

POINT II

The Misinterpretations of "Community Standards".

Under the *Miller* opinion, "contemporary community standards" are to be applied in determining the first two tests of the revised standard: i.e. whether the work taken as a whole appeals to prurient interest; and whether it is patently offensive in its description or depiction of specified sexual conduct. Two serious misinterpretations have been widely expressed, and applied. *First*, that the jury or court may apply the "standard" of the local community — town, village, city, county or even neighborhood — in which the book was distributed. *Second* that a state (or local community) can "establish" — i.e. legislate — "community standards".

"Local" Community Standards Cannot be Applied

The Supreme Court of Georgia (and various legislators) have already interpreted *Miller* to mean that "local" community standards, rather than a state-wide community standard, can be applied in determining prurient appeal and patent offensiveness. In the *Jenkins* ("Carnal Knowledge") opinion the Georgia Supreme Court said "The *Miller* case, *supra*, further held that juries can consider State or local community standards in lieu of 'national standards' ..." (emphasis supplied).

We believe that in *Miller*, this Court sanctioned the use of state-wide community standards, but did not hold that "local community standards" could be applied. It is essential that this be made clear, as soon as possible. The Authors League has expressed its view that even 50 state-wide standards will restrict dissemination of books and films that can only be produced if they may be distributed to national audiences. (Cong. Record, March 21, 1973; p. E 1719). But the application of innumerable "local community" standards would produce a massive crazy-quilt of censorship that would suppress—on a vast scale—the distribution of books and films of substantial literary and artistic value, which deal with sexual themes.

There are thousands of "local communities" in the United States—cities, towns, villages, counties and other political entities. If a work's prurient appeal or patent offensiveness can be judged differently under the separate standard of each community in which it is distributed, publishers and producers will steer away from non-obscene books and films likely to arouse any opposition because of sexual themes. They cannot afford to defend a multiplicity of suits.* And

* If local community standards are permitted, an appellate decision clearing a book or film of prurency or offensiveness under one community's standard would still leave it exposed to many more suits in the state for the same offense, since other communities' standards could be different.

they cannot risk losing several markets, for their books and films must be distributed nationally to be economically viable. (Although a national or state-wide standard might sometimes be lower than that of a few liberal communities, it is far less inhibiting on publication and film production than the crazy-quilt censorship of "local" community standards.)

It is significant that *Miller v. California* was decided in the California courts on the basis of a state-wide community standard. Previously, the California Supreme Court had rejected the contention that local community standards should be applied in determining obscenity. *In Re Giannini*, 69 Cal. 2d 563, 72 Cal. Rep. 655, 446 P. 2d 535 (1968); cert. den. 395 U.S. 910 (1969). Refusing to apply "local" community standards, the California Supreme Court said:

"... on balance a community comprised of the entire State of California is the more appropriate. This standard avoids administrative problems in determining the exact scope of the smaller community: whether it should be city, county, individual neighborhood within a city, or whatever. Moreover, a strong policy favors uniformity of application of state criminal law (citation omitted); we promote this policy by assuring that the application of the obscenity law in this state will be based on a uniform 'community'." (446 P. 2d, at 547)

We believe that this Court, in *Miller v. California*, did not permit the application of "local" community standards. And we urge that it grant rehearing to make that point clear. Otherwise, many prosecutions will be threatened, commenced and sustained on the erroneous theory adopted by the Supreme Court of Georgia—claiming many booksellers, theatre owners and librarians as innocent (and needless) victims.

Community "Standards" Cannot Be Legislated

A widespread misunderstanding has developed that under *Miller v. California* states or local communities can "establish"—i.e. legislate—their own "standards" for determining obscenity. For example, Representative Edwards of Alabama told the House of Representatives on June 28, 1973 that in light of the Supreme Court's ruling

"that the people of a city like Mobile, Ala. (do not) have to accept public depiction of conduct found tolerable in cities such as Las Vegas or New York. . . . I have introduced legislation to control the mailing or selling of indecent literature and to let the local community determine its own standards." (Emphasis supplied) (Cong. Record, June 28, 1973; p. H5639).

Under *Miller*, as under *Roth v. United States* (354 U.S. 476), the "community standard" is applied in deciding whether a work appeals to prurient interest, and whether it is patently offensive. The community "standard" is a consensus, which may shift from time to time, and has to be ascertained by the jury as a matter of fact. These "standards" cannot be established, as a set of rules, by state or local legislation. And states, towns, cities and counties cannot set up their own "standards" to define what is "obscene" and, therefore, may be prohibited despite the First Amendment. The standards which determine the definition of obscenity are the 3-part "guidelines" set forth in *Miller*. In view of the pervasive misconception that local communities or states can legislate other definitions of "obscenity", the Court should—on rehearing—leave no doubt that state legislatures are governed by the 3-part standard laid down in *Miller*, as they were bound by the earlier *Roth*

guidelines. This would make it clear to legislators and judges that a state cannot classify a work as "obscene" unless: taken as a whole, it appeals to prurient interest; *and*, its description or depiction of specifically defined sexual conduct* is patently offensive; *and* the work, taken as a whole, *also* lacks serious literary, artistic, political or scientific value.

POINT III

Misinterpretations of the "Serious Value" Test.

Under the *Miller* guidelines, the states (or local communities) cannot suppress a book or film that has serious literary, artistic, political or scientific value—even though it appeals to prurient interest and is patently offensive. Many critics and proponents have failed to grasp this limitation on the states' power to censor works dealing with sexual themes. Moreover, many of them have failed to recognize that a *lack* of literary, artistic, scientific or political value is not to be determined by applying a "community standard"; and is not to be determined by the subjective "literary" or "artistic" judgments of the jurors, trial judges or appellate justices.

Jurors and judges who might not personally consider that *Ulysses* had serious literary or artistic value, if they read it, would nonetheless concede that it had recognized "literary"

* Much confusion stems from the fact that the Court's "examples" of patently offensive depictions of conduct, which the states may "define" under the second test, are not merely "examples" but a full cataloging of the types of offensive descriptions that could logically fit into this test. Many commentators and legislators have erroneously read "a few plain examples" as an invitation to the states to add more innocuous forms of amorous conduct to the list.

value—in the eyes of critics, scholars and other literary experts. Under the literary and artistic value test of *Miller*, a conviction of *Ulysses* or *Tropic of Cancer* or *Lady Chatterly's Lover*, would be reversed by this Court. However the First Amendment protects new works as well as battle-scarred veterans of the censorship wars. And the recent decision of the Supreme Court of Georgia, in the CARNAL KNOWLEDGE case, indicates the need for clarification of the "serious value" standard.

As the minority opinion of Justice Gunter indicates, the film was received by prominent reviewers as a work with serious literary and artistic value, as indeed it is. As Justice Gunter's opinion also indicates, the four members of the majority substituted their personal evaluation of the film's literary and artistic merits (an evaluation with which the three members of the minority strongly disagreed). On rehearing, the Court should make it clear that a jury or judge cannot decide that a work lacks serious literary or artistic value by applying "community standards" or their own subjective judgment. The Court has pointedly limited the application of community standards to the prurient interest and patent offensiveness tests. Clearly it did not intend that community standards be used in judging literary, artistic, scientific, or social value. The Springfield REPUBLICAN may have reflected the standards of the community when it pronounced in 1934 "That the book (ULYSSES) possesses literary importance, except as a tour de force, is hard to believe." (Book Review Digest, H. W. Wilson Company, 1934). But ULYSSES had serious literary and artistic value, nonetheless, in Paris, New York—and Springfield.

Lack of scientific and literary value cannot be established by majority vote, which is essentially what the "consensus" of community standards reflect. Moreover, majorities (per

se) are not qualified to pass judgment on the literary or artistic value of books. Example: in a 1969 Gallup poll, 58% of the adults polled said "they had never read a book from cover to cover. . ." (PUBLISHERS WEEKLY, June 2, 1969, p. 59) Example: "According to figures familiar to librarians, 20 per cent of book users account for 70% of book use. According to a PUBLISHERS WEEKLY survey of several years ago, 9 per cent of the population buys 70% of all paperbacks." (*The Future of General Adult Books and Reading in America*, American Library Association; 1970; p. 92)

Under the Miller guidelines a prurient, patently offensive work can only be suppressed if it lacks "serious" literary, artistic, scientific or political value. It seems clear that the word "serious" was intended to require some discernable quantum of literary or artistic value—to prevent unadulterated, hard-core pornography from being "redeemed" by inserting "a quotation from Voltaire on the flyleaf." In view of the widespread misunderstanding of the revised guidelines, the Court should (on rehearing) make it clear that "serious" is a measurement of quantum and not a requirement that the work be sober rather than comic, or didactic rather than entertaining. *Gargantua and Pantagruel* is "a comic and satirical masterpiece" (*Encyclopedia Britannica*, 1971; Vol. 18, p. 979); as such it has "serious" literary and artistic value under the *Miller* guidelines.

POINT IV

Rehearing Should be Granted to Reconsider The Requirement of a Prior Civil Determination of Obscenity.

In *Jenkins v. The State of Georgia*, a theatre owner was convicted and sentenced for making the same error of judgment committed by three justices of the State's highest court. He thought that the film was not "obscene" and exhibited it. But his failure to predict correctly how the jury would evaluate it subjects him to serious penalties. Most booksellers, theatre owners and librarians cannot safely predict whether controversial books or films will be adjudicated obscene—after they have exhibited or distributed them. And they cannot assume the heavy financial burdens and personal risks of a prosecution, even if it is unsuccessful or overturned on appeal. Consequently librarians, booksellers and theatre owners are driven to self censorship—they will not stock or show non-obscene films that are controversial. And they are easy victims of grass-roots censorship; threats of prosecution coerce them into removing or rejecting non-obscene works that are entitled to First Amendment protection under the *Miller* standards. The dynamics of that suppression are discussed in the brief *amicus curiae* of the Authors League (filed on July 13, 1973), urging the Court to note probable jurisdiction in *Kirkpatrick & Dargis v. People of the State of New York* (32 N.Y. 2d 17).

The Authors League believes that a judicial safeguard is needed to prevent widespread suppression of non-obscene books and films—and to provide fair notice to theatre owners like Mr. Jenkins, so they will not be jailed, fined, and subjected to calumny and heavy legal expenses, for conclud-

ing, as three Georgia Supreme Court justices did, that "Carnal Knowledge" was not an obscene film. That safeguard, which the League had proposed in earlier *amicus* briefs, was urged by Justice Douglas and approved by Chief Justice Burger in *Müller v. California*. On rehearing, the Court should rule that under the First Amendment, a bookseller, librarian or theatre owner cannot be criminally prosecuted for distributing or exhibiting a book or film which has not previously been adjudged obscene in a prior civil, adversary proceeding. The Authors League also urged this safeguard in its *Kirkpatrick* brief.

POINT V

On Rehearing, The Court Should Adopt the Conclusions Reached by Justice Brennan in *Paris Adult Theatre I*.

In its *amicus curiae* briefs in *Roth v. United States*, 354 U.S. 476 (1957) and *Ginzburg v. United States*, 383 U.S. 463 (1966), the Authors League urged this Court to take the position which Justices Brennan, Stewart and Marshall adopted on June 21, 1973 in *Paris Adult Theatre I v. Slaton*. (41 LW at 4955) In its *Ginzburg* brief the League said:

"... no public interest, superior to the preservation of the rights of free speech and free press, is served by permitting (an obscenity) statute to be invoked where a book or other publication—regardless of content—is sold to adults and where it is published and disseminated in a manner that does not invade the privacy of individual citizens. . . .

... neither Federal or State governments should interfere with the right of the author to write, the publisher to publish, or the reader to read. In these

circumstances, the absolute guaranty of the First Amendment can and should be retained. Not only are the rights of freedom of speech and press thus surely preserved, but each citizen is then free to make his own choice of reading material—which in a mature and free society is where the choice should rest."

That is still the position of the Authors League. We believe, for the reasons set forth in Mr. Justice Brennan's *Slaton* opinion, that it is the only solution compatible with the First Amendment. The Amendment is violated when a state prevents a librarian or bookseller from distributing to an adult *TROPIC OF CANCER*, *LADY CHATTERLY'S LOVER*, *MEMOIRS OF HECATE COUNTRY*, *FANNY HILL* or any other book he or she chooses to read. The Amendment is violated when a state prevents a theatre from exhibiting *CARNAL KNOWLEDGE* or *CLOCKWORK ORANGE* or any other film to adults who choose to see it. And it is a self-contradiction to rule that the First Amendment only protects works that are acceptable under "contemporary community"—i.e. majority—standards. The very purpose of the Amendment is to protect the rights of minorities to publish or read works that are unacceptable to the majority.

Furthermore, the *TROPIC OF CANCER* prosecutions and similar experiences prove that works of "serious" literary and artistic value cannot be adequately safeguarded unless there is complete protection for all works distributed to willing adults, by means that do not thrust them on unwilling recipients. *CARNAL KNOWLEDGE* is a film of serious artistic and literary value. Under the *Miller v. California* standard, therefore, it should not have been suppressed. But as Justice Gunter said in his dissenting opinion, his experience with the *CARNAL KNOWLEDGE* case "teaches me

that the Miller majority's assumption, that courts can distinguish commerce in ideas that is protected from commercial exploitation of material that is not protected, is a too optimistic assumption."

CONCLUSION

It is respectfully submitted that the Petition for Rehearing should be granted.

Respectfully submitted,

IRWIN KARP

*Attorney for The Authors League
of America, as amicus curiae*

234 W. 44th Street

New York, N.Y. 10036